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Supreme Court, U.S.
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In the Supreme Court of the United States

No. 727 October Term, 1970

WILLIAM P. SAILER, Individually and as Executive Director of the Philadelphia County Board of Assistance and STANLEY A. MILLER, Individually and as Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania,
Appellants

v.

ELSIE MARY JANE LEGER, BERYL JERVIS,
Appellees

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

SINGLE APPENDIX TO BRIEF FOR APPELLANTS, SAILER AND MILLER

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TABLE OF CONTENTS

PAGE

APPENDIX:

I. Docket Entries 1a

II. Complaint 6a

III. Answer 16a

IV. Stipulation 17a

V. Supplemental Stipulation 23a

VI. Motion 24a

VII. Order Dated Dec. 9, 1969 ..... 33a

VIII. Testimony:

Proceedings of March 3, 1970 ..... 34a

Proceedings of April 6, 1970:

PLAINTIFFS' EVIDENCE

Deborah Davis:

Direct 85a

Cross 96a

Maia Andre:

Direct 97a

PLAINTIFFS' EXHIBITS

1—General Assistance and the Alien in Pennsylvania 138a

IX. Order Constituting a Three-Judge Court .. 147a

X. Opinion of the Court 148a

APPENDIX

SUPREME COURT OF THE UNITED STATES
October Term, 1970

No. 727

WILLIAM P. SAILER, et al.,
Appellants

v.

ELSIE MARY JANE LEGER and BERYL JERVIS,
Appellees

Appeal from the United States District Court for the Eastern District of Pennsylvania

Filed September 21, 1970

Probable Jurisdiction Noted December 14, 1970

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 69-2869

Elsie Mary Jane Leger, 716 North Broad Street, Philadelphia, Pennsylvania on behalf of herself and all others similarly situated,

Plaintiffs

v.

William P. Sailer, individually and as the Executive Director of the Philadelphia County Board of Assistance, 1400 Spring Garden Street Philadelphia, Pennsylvania, Stanley A. Miller, Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania Health and Welfare Building Harrisburgh, Pennsylvania,

Defendants

I.

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Attorneys:

For plaintiff: Jonathan M. Stein, Barry S. Kohn, 313 So. Juniper Street 19107.

For defendant: William C. Sennett, Attorney General, Joseph P. Work, De. Atty. General, State Capitol, Harrisburg, Pa.

Date, 1969

Dec. 9, Plff's. application to proceed in forma pauperis and Order granting same, without prepayment of any fees, costs or security thereof, filed. HKW

Dec. 9, Complaint filed.

Dec. 9, Summons exit.

Dec. 9, Motion and Order granting temporary restraining Order that defts. are restrained from denying General Assistance to plff. solely because she is not a citizen of the U. S., filed. HKW.

Dec. 9, Plff's. memorandum in support of motion for temporary restraining order, filed.

Dec. 29, Answer filed.

Dec. 29, Case listed for trial.

1970

Jan. 13, Order, Wood, J., continuing hearing of 1/15/70 to a date to be fixed by the Court subsequent to 2/16/70, filed. HKW. Entered and copies mailed 1/13/70.

Jan. 30, Order that application to refer this case to a three-judge court will be heard on 3/3/70 at 10:00 a.m., filed. HKW. Entered and copies mailed 1/31/70.

Mar. 3, Argument sur: Plff's. motion for three-judge court and for a class action. HKW.

Mar. 6, Plff's. motion for leave to amend complaint to add a party and for a temporary restraining order, filed.

Mar. 10, Motion to amend complaint and notice of same, filed.

Mar. 12, Order, designating Arlin M. Adams, C.J.; C. William Kraft, D.J.; and Harold K. Wood, D.J.; as members of three-judge court, filed. Entered and copies mailed 3/13/70. Hastie.

Mar. 13, Memorandum and Order that motion for temporary restraining order directing the Commonwealth of Pa. to pay welfare to Beryl Jervis is denied without prejudice, filed. HKW. Entered 3/16/70, copies mailed 3/13/70.

Mar. 13, Plff's. motion for determination of class action, and memorandum in support of same, filed.

Mar. 13, Plff's. motion to amend complaint and notice of same, filed.

Mar. 16, Plff's. memorandum of law for convening three-judge court, filed.

Mar. 16, Order fixing hearing before three-judge court on 4/6/70 at 10:00 a.m., filed. Entered and notice mailed 3/17/70. HKW.

Mar. 18, Transcript of 3/3/70, filed.

Mar. 23, Summons returned "on 1/13/70 as to Stanley A. Miller" and "on 3/17/70 as to Wm. P. Sailer" served and filed.

Mar. 31, Stipulation as to certain facts, filed.

Mar. 31, Memorandum of law in support of plff's. motion for declaratory judgment and preliminary and final injunction, filed.

Apr. 2, Memorandum of law in opposition to plff's motion for declaratory judgment and preliminary and final injunction, filed. Adams, C.J., HKW.

Apr. 6, Hearing sur: Preliminary and Final Injunction—CAV.

Apr. 16, Supplemental stipulation as to certain facts, filed.

Apr. 16, Suppl. memorandum of law in support of plff's. motion for declaratory and preliminary and final injunction, filed.

Apr. 21, Transcript of 4/6/70, filed.

Jul. 13, Opinion and Order, Adams, C. J. and Kraft, D. J., that defts. are enjoined from enforcing that portion of the Penna. Statute which denies general assistance to persons because of alienage, with Dissenting Opinion by Wood, J., filed. Entered and notice mailed 7/13/70.

Aug. 6, Notice of appeal to the Supreme Court of the United States by W. P. Sailer, et al., and certificate of service, filed.

Sep. 28, Record transmitted to U. S. Supreme Court.

II.

COMPLAINT

(For declaratory judgment and to enjoin preliminarily and permanently the denial of General Assistance to plaintiffs the United States, in derogation of their rights under the laws and the Constitution of the United States.)

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1. The jurisdiction of this Court is invoked under Title 28, U.S.C. Sec. 1343 (3) and (4), 42 U.S.C. Sec. 1983, U.S.C. Secs. 2281, 2284 and 28 U.S.C. Secs. 2201, 2202, this being an action for declaratory judgment and preliminary and permanent injunction to redress the deprivation under color of state law of rights, privileges and immunities secured to plaintiffs by the laws and the Constitution of the United States.

2. Plaintiffs are:

(a) Elsie Jane Leger, an alien continuously residing in the United States for four and half years, presently residing at 716 North Broad Street, Philadelphia, Pennsylvania;

(b) All other residents of the Commonwealth of Pennsylvania, who are subject by the laws and policies complained of herein to denial of General Assistance, regardless of need therefor, solely because they are not citizens of the Unites States.

3. Named plaintiff will fairly and adequately represent the interests of the class of Pennsylvania residents described in Paragraph 2(b) above, on whose behalf she sues; the persons constituting said class are so numerous as to make it impractical to join them all before this Court; the claims of named plaintiff are typical of the claims of said class; and there are herein questions of law and fact common to said class. Named plaintiff has requested relief for said class and will prosecute this action with a vigor commensurate with its importance to all members of said class.

4. Defendants are:

(a) William P. Sailer, Executive Director of the Philadelphia County Board of Assistance and a resident of the Commonwealth of Pennsylvania and a resident thereof.

(b) Stanley A. Miller, Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania and a resident thereof.

The foregoing public officers are charged under the Public Welfare Code of the Commonwealth of Pennsylvania with the enforcement, operation and execution of the provisions thereof. The County Board of Assistance Executive Director is particularly charged with the administration of public assistance and determination of the eligibility of persons receiving assistance in accordance with said law. The Public Welfare Code of the Commonwealth of Pennsylvania, a codification of public assistance laws

adopted since June 24, 1937, was enacted on June 13, 1967, P. L. , 62 Purd. Stat. Secs. 401 et seq. The provisions of the Public Welfare Code here at issue are attached hereto as Exhibit "A".

5. The Public Welfare Code, Sec. 432, 62 Purd. Stat. Sec. 432, provides that public assistance shall be granted to needy persons for whose assistance federal financial contributions are available, i.e., those persons eligible for "old-age assistance", "aid to the blind", "aid to families with dependent children", "aid to the permamently and totally disabled", and to other needy persons not so eligible but who are citizens of the United States. The latter category of public assistance is called "General Assistance".

6. Plaintiff Leger was born in Alford, Scotland on March 7, 1937.

7. On May 17, 1965 at the age of twenty-eight, plaintiff came to the United States to undertake domestic work under contract with a family in Havertown, Pennsylvania. Plaintiff has resided continuously in Pennsylvania since 1965 and has been a tax-paying resident of Pennsylvania for the past Four (4) years.

8. Plaintiff's father and mother are both citizens and residents of Scotland.

9. Plaintiff Leger worked as a domestic in Havertown at Twenty-Five ($25.00) Dollars per week until 1967 during which year she left her employment to obtain a higher paying job at Sixty ($60.00) Dollars

per week with Physicians Clinical Laboratory in Philadelphia.

10. During this period plaintiff entered into a common law marriage with one, Alex J. Leger, who was employed at the time at The Toddle House at wages of One Hundred ($100.00) Dollars per week, but who was forced to give up such employment in March 1969 due to a hiatial hernia and a serious gastro-intestinal condition.

11. Plaintiff was forced to give up her employment in September 1969 because of severe chest pains for which she was and is being treated at St. Joseph's Hospital Clinic. Plaintiff had no history of this ailment prior to September 1969.

12. Faced with the threat of eviction in September 1969 plaintiff and Mr. Leger were compelled to leave their apartment and slept overnight for two (2) nights at the Trailway Terminal in Philadelphia.

13. Soon thereafter, on or about October 3, 1969 plaintiff and Mr. Leger applied for public assistance from the Girard District of the Philadelphia County Board of Assistance.

14. Mr. Leger was granted assistance of One Hundred and Twenty-One ($121.00) Dollars monthly for himself, and plaintiff was denied any assistance on the grounds that she was not a citizen. Thus plaintiff and Mr. Leger must attempt to subsist on a total income of One Hundred and Twenty-One ($121.00) Dollars per month, ninety (90%) percent of the amount determined necessary by the Department of Public Welfare of the Commonwealth of

Pennsylvania, in 1957, to sustain the life of one (1) person at a minimum standard of health and decency.

15. Plaintiff and Mr. Leger's total current income of One Hundred and Twenty-One ($121.00) Dollars per month from public a assistance falls Sixty-Three ($63.00) Dollars per month below the amount, One Hundred and Eighty-Four ($184.00) Dollars per month, determined necessary by the Department of Public Welfare, in 1957, to sustain a family of two (2) at ninety (90%) percent of a minimum standard of health and decency. Such sum of One Hundred and Eighty-Four ($184.00) Dollars monthly is itself, according to the United States Department of Labor, Bureau of Labor Statistics, only sixty (60%) percent of what a family of two (2) requires for a minimal standard of living in Philadelphia.

16. Plaintiff continues to suffer from severe chest pains has had a weight loss of seventeen (17) pounds in the past few months. She is continuing to lose weight.

17. It is medically necessary for plaintiff to have a nutritious diet and for Mr. Leger to have a special, costly high protein diet for his gastro-intestinal condition.

18. Plaintiff and Mr. Leger have not had sufficient funds to purchase a minimal diet even after selling their belongings in order to get money to purchase food. They have not had a complete meal for any day in the past week.

19. Plaintiff is overdue by at least a week's rent and will soon face eviction from the landlord.

20. Plaintiff and Mr. Leger do not have access to most of their clothing and personal belongings which remains in a Trailways Bus Terminal locker. Plaintiff and Mr. Leger do not have the Fifteen ($15.00) Dollars to pay the storage charges to retrieve their belongings.

21. Plaintiff is suffering and will suffer immediate and irreparable injury because General Assistance has been wrongfully denied. Monetary damages are inadequate and accordingly, injunctive relief is necessary.

22. The Public Welfare Code of the Commonwealth of Pennsylvania Sec. 432(2), 62 Purd. Stat. Sec. 432(2), requiring as a condition of eligibility for general assistance that plaintiff be a citizen of the United States, is contrary to the laws and constitution of the United States in that:

(a) said requirement imposes upon the residence of aliens lawfully within the United States, discriminatory burdens beyond those contemplated by the laws of the United States regulating immigration and naturalization, in violation of the Supremacy Clause, Article VI of the United States Constitution;

(b) said requirement denies to plaintiff and other needy residents of Pennsylvania who are not citizens of the United States the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution;

(c) said requirement denies plaintiff and other needy residents of Pennsylvania who are not citizens of the United States due process of the law by arbitrarily and unreasonably withholding assistance from

them in violation of the Fourteenth Amendment of the United States Constitution; and

(d) said requirement denies plaintiff and other needy residents of Pennsylvania who are not citizens of the United States the rights of freedom of association and of travel in violation of the First and Fourteenth Amendments of the United States Constitution.

Wherefore, plaintiff respectfully pray that:

1. That a three-judge court be convened as required by Title 28, U.S.C. Secs. 2281 and 2284;

2. The Court declare the Public Welfare Code of the Commonwealth of Pennsylvania, Sec. 432(2) 62 Purd. Stat. Sec. 432 (2), and any enforcement thereof unconstitutional;

3. The Court preliminarily enjoin and, after full hearing, permanently enjoin defendants from enforcing the Public Welfare Code of the Commonwealth of Pennsylvania, Sec. 432(2), Purd. Stat. Sec. 432 (2);

4. The Court order back payments to plaintiff in the amount of assistance wrongfully withheld; and

5. The Court grant such further relief as shall be necessary and proper.

Jonathan M. Stein
Barry S. Kohn
Doug[illegible] G. Dye
Harv[illegible] Schmidt
Attorneys for Plaintiffs
Community Legal Services, Inc. 313 South Juniper Street Philadelphia, Pennsylvania 19107

Of Counsel:
Jonathan A. Weiss, Esq.

Exhibit "A"

POOR PERSONS AND PUBLIC ASSISTANCE
62 §432

---

§426. Employment of credit rating agencies

As need may require each county board may employ the services of commercial credit rating agencies for the purpose of determining eligibility for general assistance.

1967, June 13, P. L. , No. 21, art. 4, §426.

§427. Receipt and expenditure of contributions

Each county board may receive and spend contributions from any source for purposes related to assistance, or to the work of the department.

1967, June 13, P. L. , No. 21, art. 4, §427.

(e) Assistance other than medical assistance for the aged and purchased Hospital and Post Hospital Care

§431. Application.

Except as provided in section 446(1)[1] every person applying for public assistance shall be required to sign a statement setting forth his financial status and such other facts as may be required by the department, in order to determine whether such person is entitled to public assistance, and shall also be required to sign, as part of his written application, his own bond to the Commonwealth without surety, containing a warrant of attorney to confess judgment in

---

[1] Section 446(1) of this title.

the penal sum of five hundred dollars ($500), which bond shall be conditioned on the truth and lack of fraud and misrepresentation in any of the statements made by such applicant in his written application. Every such applicant shall make affidavit that the facts set forth in such statement are true and correct. Every person employed in the administration of public assistance shall have power to administer oaths for the purpose of carrying into effect the provisions of this section.

1967, June 13, P. L. , No. 21, art. 4, §431.

§432. Eligibility

Except as hereinafter otherwise provided, and subject to the rules, regulations, and standards established by the department, both as to eligibility for assistance and as to its nature and extent, needy persons of the classes defined in clauses (1) and (2) of this section shall be eligible for assistance:

(1) Persons for whose assistance Federal financial participation is available to the Commonwealth as old-age assistance, aid to the blind, aid to families with dependent children, aid to the permanently and totally disabled, or as other assistance, and which assistance is not precluded by other provisions of law.

(2) Other persons who are citizens of the United States, or who, during the period January 1, 1938 to December 31, 1939, filed their declaration of intention to become citizens.

(3) Assistance other than Federal-State blind pension shall not be granted (i) to or in behalf of any

person who disposed of his real or personal property, of the value of five hundred dollars ($500), or more without fair consideration, within two years immediately preceding the date of application for assistance; (ii) to an inmate of a public institution; or, (iii) in behalf of an inmate of a public institution, unless he is a patient in a medical institution who is eligible for aid to the permanently and totally disabled.

(4) Federal-State blind pension shall be granted only to or in behalf of any person who (i) is twenty-one years of age or older and meets the requirement as to residence prescribed in clause (6) of this section; (ii) has three-sixtieths or ten-two hundredths, or less, normal vision; (iii) is not an inmate of a public institution (except as a patient in a medical institution), a penal institution, or a hospital for mental disease; . . .

Commonwealth of Pennsylvania
County of Philadelphia, ss:

I, Elsie Mary Jane Leger, being duly sworn according to law, deposes and says that she is the plaintiff in the foregoing pleadings and that the facts set forth therein are true and correct to the best of her knowledge, information and belief.

Elsie Mary Jane Leger

Sworn to and subscribed before me this ———— day of———————, 1969.

———————

Notary Public

III.

ANSWER

[Caption Omitted]

First Defense

The complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

Defendants admit the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 and deny the allegations contained in paragraphs 21 and 22 of the complaint.

Respectfully submitted,

Joseph P. Work
Deputy Attorney General
William C. Sennett
Attorney General

Certificate of Service

I hereby certify that a copy of the foregoing Answer has been furnished by mail to the following on the 29th day of December, 1969.

Jonathan M. Stein, Esquire
Community Legal Services, Inc.
313 South Juniper Street
Philadelphia, Pennsylvania 19107
Barry S. Kohn, Esquire
Community Legal Services, Inc.
313 South Juniper Street
Philadelphia, Pennsylvania 19107

Joseph P. Work
Deputy Attorney General

IV.

STIPULATION
[Caption Omitted]

And now, this day of March, 1970, it is hereby stipulated and agreed by and between counsel for plaintiffs and defendants in the above titled action, as follows:

1. That plaintiffs are:

   (a) Elsie Mary Jane Leger, a resident alien, presently residing at 716 North Broad Street, Philadelphia, Pennsylvania;

   (b) Beryl Jervis, a resident alien, presently residing at 1800 Orthodox Street in Philadelphia, Pennsylvania; and

   (c) All other residents of the Commonwealth of Pennsylvania who are indigent and otherwise eligible for General Assistance but who are subject to denial of General Assistance solely because they are not citizens of the United States.

2. That the class of persons plaintiffs seek to represent numbers approximately sixty-five (65) to seventy (70) cases annually, according to the average rate of rejection of public assistance applications on grounds of lack of United States citizenship over the past five fiscal years. That such class is so numerous as to make it impractical to join them all before this court.

3. That the named plaintiffs will fairly and adequately represent the interests of the above described class, that the claims of named plaintiffs are typical of the claims of the class, and that there are questions of law and fact common to said class.

4. That defendants are:

(a) William P. Sailer, sued individually and as Executive Director of the Philadelphia County Board of Assistance; and

(b) Stanley A. Miller, sued individually and as Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania.

5. That the defendants are public officers charged under the Pennsylvania Public Welfare Code, 62 Purd. Stat. Section 401, *et seq,* with the enforcement, operation and execution of the public assistance program.

6. That the Public Welfare Code Section 432, 62 Purd. Stat. Section 432, provides that public assistance shall be granted to all needy persons for whose assistance federal financial contributions are available, i.e. those eligible for "old-age assistance" (OAA), "aid to the blind" (AB), "aid to families with dependent children" (AFDC), and "aid to the permanently and totally disabled" (APTD), and that public assistance shall be granted to all other needy persons not so eligible who are citizens of the United States (General Assistance).

7. That pursuant to Section 432 defendants provide public assistance, funded in part by the Com-

monwealth of Pennsylvania, to needy resident aliens eligible under the above listed federally-aided categories, but deny public assistance to needy resident aliens not so eligible.

8. That plaintiff Leger was born in Alford, Scotland on March 7, 1937. Plaintiff's father and mother are both citizens and residents of Scotland.

9. That on May 18, 1965, at the age of twenty-eight, plaintiff came to the United States to undertake domestic work under contract with a family in Havertown, Pennsylvania. Plaintiff has resided continuously in Pennsylvania since 1965 and has been a taxpaying resident of Pennsylvania for the past four (4) years.

10. That plaintiff Leger worked as a domestic in Havertown until 1967, during which year she left her employment to obtain a higher paying job at Physicians Clinical Laboratory in Philadelphia.

11. That during this period plaintiff entered into a common law marriage with one, Alex J. Leger, who was employed at the time but who was forced to give up such employment in March 1969, due to a hiatial hernia and a serious gastro-intestinal condition.

12. That plaintiff was forced to give up her employment in September, 1969, because of severe chest pains for which she was treated at St. Joseph's Hospital Clinic and for which she is now being treated at Pennsylvania Hospital for this condition and also a kidney infection. Plaintiff had no history of this ailment prior to September, 1969.

13. That plaintiff and her husband were faced with the threat of eviction in September, 1969, and were compelled to leave their apartment for nonpayment of rent. They slept overnight for two (2) nights at the Trailways Bus Terminal in Philadelphia.

14. That on or about October 3, 1969, plaintiff and Mr. Leger applied for public assistance from the Girard District of the Philadelphia County Board of Assistance.

15. That Mr. Leger was granted assistance of one hundred and twenty-one ($121.00) dollars monthly for himself, but plaintiff was denied any assistance on the grounds that she was not a citizen.

16. That plaintiff and Mr. Leger attempted to subsist on a total income of one hundred and twenty-one ($121.00) dollars per month, ninety (90%) percent of the amount determined necessary by the Department of Public Welfare of the Commonwealth of Pennsylvania, in 1957, to sustain the life of one (1) person at a minimum standard of health and decency.

17. The plaintiff and Mr. Leger's income of one hundred and twenty-one ($121.00) dollars per month from public assistance fell sixty-three ($63.00) dollars per month below the amount, one hundred and eighty-four ($184.00) dollars per month, determined necessary by the Department of Public Welfare, in 1957, to sustain a family of two (2) at ninety (90%) percent of a minimum standard of health and decency. Such sum of one hundred and eighty-four ($184.00) dollars monthly was itself, according to the United States Department of Labor, Bureau of Labor Sta-

tistics, only sixty (60%) percent of what a family of two (2) requires for a minimal standard of living in Philadelphia.

18. That from October 3, 1969, to December 9, 1969, plaintiff Leger and her husband had insufficient funds to purchase a minimally adequate diet, to maintain rental payments, or to retrieve their clothing and personal belongings then in storage at the Trailway Bus Terminal.

19. That on December 9, 1969; plaintiff Leger commenced this action and was granted a Temporary Restraining Order preventing the defendants from continuing to deny her public assistance on grounds of lack of United States citizenship. Plaintiff Leger commenced receiving, and continues to receive, with her husband a public assistance grant semi-monthly.

20. That plaintiff Beryl Jervis was born in Panama on December 10, 1912, and is a citizen thereof.

21. That on March 1, 1969, at the age of fifty-five, plaintiff Jervis came to the United States to undertake domestic work under contract in Philadelphia, Pennsylvania. Plaintiff has resided continuously in Pennsylvania since March 1, 1968, and has been a taxpaying resident of Pennsylvania for the past two (2) years.

22. That plaintiff Jervis worked as a domestic in Philadelphia for approximately one year, then obtained a higher paying job operating pressing machines at Kline's Laundry, Frankford and Adams Avenues in Philadelphia.

23. That in mid-February, 1970, plaintiff Jervis was forced to give up her employment due to influenza. Plaintiff is currently under a doctor's care.

24. That plaintiff Jervis must seek less strenuous employment and wishes to obtain such employment, but is currently without even the funds minimally needed to search for employment.

25. That plaintiff Jervis, on or about February 26, 1970, applied for public assistance at the North District office of the Philadelphia County Board of Assistance, and was denied public assistance solely on the ground that she is not a citizen of the United States.

26. That plaintiff Jervis is currently without sufficient funds to purchase food and is subsisting solely on the uncertain charity of friends and church. Plaintiff is also without funds to pay past due rent and faces imminent constable's action and eviction.

27. That on March 3, 1970, plaintiff Jervis was added as a party plaintiff in this action, but her motion for a Temporary Restraining Order to prevent defendants from continuing to deny her assistance on grounds of lack of United States citizenship was denied without prejudice.

(s) Joseph P. Work
Deputy Attorney General

(s) Jonathan M. Stein
Douglas G. Dye
Harvey N. Schmidt
Attorneys for Plaintiffs

Dated: March , 1970

V.
SUPPLEMENTAL STIPULATION
[Caption Omitted]

And Now, this day of April, 1970, it is hereby stipulated and agreed by and between counsel for plaintiffs and defendants in the above titled action, as follows:

1. That the denial of General Assistance to aliens otherwise eligible for such assistance causes undue hardship to them by depriving them of the means to secure the necessities of life, including food, clothing and shelter.

2. That the citizenship bar to the receipt of General Assistance in Pennsylvania discourages continued residence in Pennsylvania of indigent resident aliens and causes such needy persons to remove to other States which will meet their needs.

3. That the first clause of Paragraph 21 of the original Stipulation is amended to read that "on March 1, 1968" plaintiff Jervis came to the United States.

Joseph P. Work
Deputy Attorney General
Attorney for Defendants

(s) Jonathan M. Stein
Douglas G. Dye
Harvey N. Schmidt
Attorneys for Plaintiffs

Dated: April , 1970

VI.
MOTION
[Caption Omitted]

Pursuant to Title 28, U.S.C. Sec. 2284(3) and Rule 65(b), Fed. R. Civil P., and based upon the verified complaint herein, and the affidavit and certification of counsel attached hereto, plaintiffs move the Court for a temporary restraining order restraining defendants from denying General Assistance to plaintiff, and in support thereof state as follows:

1. Defendants denied General Assistance to plaintiff, Elsie Mary Jane Leger, on October 3, 1969.

2. Said denial was made because plaintiff, a Pennsylvania resident for four and a half (4½) years, is not a citizen of the United States, as required under the Public Welfare Code, Sec. 432, 62 Purd. Stat. Sec. 432, although she met all other requirements for General Assistance.

3. Plaintiff was forced to give up her employment in September, 1969 because of severe chest pains for which she was and is being treated at St. Joseph's Hospital Clinic.

4. Plaintiff's husband, Alex Leger, was forced to give up his employment in March, 1969 due to a hiatial hernia and a serious gastro-intestinal condition.

5. Mr. Leger was granted assistance of One Hundred and Twenty-One ($121.00) Dollars monthly

for himself, and plaintiff was denied any assistance on the grounds that she was not a citizen. Thus plaintiff and Mr. Leger must attempt to subsist on a total income of One Hundred and Twenty-One ($121.00) Dollars per month, ninety (90%) percent of the amount determined necessary by the Department of Public Welfare of the Commonwealth of Pennsylvania, in 1957, to sustain the life of one (1) person at a minimum standard of health and decency.

6. Absent the denial of assistance to plaintiff, plaintiff and Mr. Leger would be entitled to receive and would be receiving One Hundred and Eighty-Four ($184.00) Dollars monthly.

7. Plaintiff continues to suffer from severe chest pains and has had a weight loss of seventeen (17) pounds in the past few months. She is continuing to lose weight.

8. It is medically necessary for plaintiff to have a nutritious diet and for Mr. Leger to have a special, costly high protein diet for his gastro-intestinal condition.

9. Plaintiff and Mr. Leger have not had sufficient funds to purchase a minimal diet even after selling their belongings in order to get money to purchase food. They have not had a complete meal for any day in the past week.

10. Plaintiff is overdue by at least a week's rent and will soon face eviction from the landlord.

11. Defendants' regulations causing injury to plaintiff Leger and members of the class are clearly on their face violative of Equal Protection Clause of

the Fourteenth Amendment and Supremacy Clause of Article VI of the United States Constitution. Courts have enjoined violations of the Equal Protection Clause by States in their public assistance programs, e.g., Smith v. Reynolds, 277 F. Supp. 66 (E.D. Pa., 1967) aff'd 394 U.S. 618 (1969) (Pennsylvania residency requirement held unconstitutional); Anderson v. Schaefer, F. Supp. (Civil No. 10443, N.D. Ga., April 5, 1968) (three-judge court); Williams v. Dandridge, 297 S. Supp. 450 (D. MD. 1968, supplemental opinion, 1969) (three-judge court); Smith v. King, 277 F. Supp. 31 (N.D. Ala. 1968), aff'd on other grds, 392 U.S. (1969); and Dews v. Henry, 297 F. Supp. 587 (1969) (three-judge court).

12. Courts have consistently recognized denial or reduction of welfare benefits as causing immediate and irreparable injury and have consistently ordered temporary restraining orders in class actions brought by welfare recipients. Smith v. Reynolds, C.A. No. 42419, Order of June 17, 1967, final opinion at 277 F. Supp. 66 (E.D. Pa. 1967) (three-judge court), aff'd 394 U.S. 618 (1969); Williford v. Laupheimer, C.A. No. 69-1803, Order of August 14, 1969 (Davis, J.) (class TRO), final opinion at F. Supp. (E.D. Pa. Nov. 3, 1969); Cooper v. Laupheimer, C.A. No. 69-2421 Order of November 5, 1969 (Wright, C.J.) (class TRO); Kelly v. Wyman, 294 F. Supp. 887 (S.D. N.Y., 1968); Ramos v. Health and Social Bd., 276 F. Supp. 474 (E.D. Wisc., 1967); Wheeler v. Montgomery, C.A. No. 48303 (N.D. Calif., Dec. 6, 1967); Van Blaricum v. Dep't of Public Welfare, CCH Poverty Law Rep., para. 1610.58 (S.D. Ohio No. 68-78, March 8, 1968); Miller v.

Zoeller, CCH Poverty Law Rep., para. 9385 (N.D. Wisc., C.A. No. 69-C-2, Jan. 20, 1969); Ramos v. Health and Social Services Bd., C.A. No. 67-CO329 (E.D. Wisc., Nov. 7, 1967); and James v. Goldberg, C.A. No. 69-2448 (S.D. N.Y., June 13, 1969); Sims v. Juras, CCH Poverty Law Rep., para. 9833 (Civ. No. 69-238, D.C. Ore., April 30, 1969).

13. If this temporary restraining order be granted, the injury, if any, to defendants herein, if final judgment be in their favor, will be inconsiderable. This Court has so recognized that irreparable injury resulting from withholding of public assistance outweighs *de minimis* injury to the Commonwealth. Smith v. Reynolds, C.A. No. 42419 Order of June 17, 1967; final opinion at 277 F. Supp. 66 (E.D. Pa., 1967), aff'd, 394 U.S. 618 (1969).

(s) Jonathan M. Stein
Barry S. Kohn
Attorneys for Plaintiff
Community Legal Services, Inc.
313 South Juniper Street
Philadelphia, Pennsylvania 19107

Commonwealth of Pennsylvania
County of Philadelphia, ss:

Certification

I, Jonathan M. Stein, Attorney for Plaintiffs, in accordance with Rule 65(b), Fed. R. Civil P., hereby certify:

1. That oral notice of the above Motion for a Temporary Restraining Order was given December

8th, 1969 by telephone to Joseph P. Work, Esq., Deputy Attorney General, Department of Public Welfare, Harrisburg, Pennsylvania, Attorney for Defendants.

2. That said notice is sufficient and all that should be required because time and the immediate and irreparable harm that would accrue to plaintiff from delay pending further notice of the above Motion for a Temporary Restraining Order will permit no more.

(s) Jonathan M. Stein
Attorney for Plaintiff
Community Legal Services, Inc.
313 South Juniper Street
Philadelphia, Pennsylvania

Commonwealth of Pennsylvania
County of Philadelphia, ss:

Elsie Mary Jane Leger, being duly sworn deposes and says:

1. I make this affidavit in conjunction with the suit filed on my behalf, and other persons similarly situated, in the United States District Court against the defendants, William P. Sailer, Executive Director of the Philadelphia County Board of Assistance and Stanley A. Miller, Secretary of The Department of Public Welfare. I make it in support of the prayer therein for a temporary restraining order, declaratory judgment and for injunctive relief to prevent defendants from continuing to deny me General Assistance.

2. My name is Elsie Mary Jane Leger, and I reside at 716 North Broad Street in Philadelphia, Pennsylvania with my husband, Alex J. Leger.

3. I was born in Alford, Scotland on March 7, 1937.

4. On May 17, 1965 at the age of twenty-eight, I came to the United States to undertake domestic work under contract with a family in Havertown, Pennsylvania. I have resided continuously in Pennsylvania since 1965.

5. My father and mother are both citizens and residents of Scotland.

6. I worked as a domestic in Havertown for Twenty-Five ($25.00) Dollars per week until 1967 during which year I left my employment to obtain a higher paying job at Sixty ($60.00) Dollars per week with Physicians Clinical Laboratory in Philadelphia.

7. In or about February, 1967, I entered into a common law marriage with Alex J. Leger, who was employed at the time at The Toddle House at wages of One Hundred ($100.00) Dollars per week, but who was forced to give up such employment in March, 1969, due to a hiatial hernia and a serious gastro-intestinal condition.

8. I was forced to give up my employment in September, 1969 because of severe chest pains for which I am being treated at St. Joseph's Hospital Clinic. I had no history of chest pains prior to September, 1969.

9. My husband and I had to leave our apartment in September, 1969, because we were threatened with eviction by the landlord. We slept two (2) nights at the Trailways Terminal in Philadelphia.

10. My husband and I were sent to the Centralized Relocation Bureau at 918 North Broad Street where temporary housing was arranged for us at a hotel at 1607 W. Girard Avenue. However, we were forced to leave because we fell three (3) weeks behind in our rent.

11. On or about October 3, 1969, I applied for General Assistance with my husband at the Girard District of the Philadelphia County Board of Assistance.

12. While waiting for my husband's public assistance check to arrive, we had to sleep three (3) nights in the Trailways Terminal.

13. My husband was granted assistance of One Hundred Twenty-One ($121.00) Dollars monthly for himself, and I was denied any assistance on the grounds that I was not a citizen.

14. I have continued to suffer from severe chest pains and have lost seventeen (17) pounds in the past few months. I am continuing to lose weight.

15. I need a nutritious diet, however, due to the lack of sufficient funds, I have not had a complete meal any day in the past week.

16. My husband and I have to sell our belongings in order to obtain money to purchase food for a minimal diet.

17. We have had to go to The Salvation Army for food twice and were given milk, cereal and crackers.

18. My husband and I are behind in our rent by two (2) weeks and again fear eviction by the landlord.

19. I do not have access to my clothing or personal belongings because I am not able to pay the Fifteen ($15.00) Dollars storage charges.

Elsie Mary Jane Leger

Sworn to and subscribed before me this —— day of———— , 1969.

———————————

Notary Public

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 69-2869

Elsie Mary Jane Leger, 716 North Broad Street Philadelphia, Pennsylvania on behalf of herself and all the others similarly situated,

Plaintiffs

v.

William P. Sailer, individually and as the Executive Director of the Philadelphia County Board of Assistance, 1400 Spring Garden Street Philadelphia, Pennsylvania, Stanley A. Miller, individually and as Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania Health and Welfare Building, Harrisburg, Pennsylvania,

Defendants

VII.

ORDER

Whereas, in the above titled action it appears by verified complaint, motion and affidavit that a temporary restraining order, pursuant to Title 28, U.S.C. Sec. 2284 (3) and Rule 65 (b), Fed. R. Civ. P., should

issue because immediate and irreparable injury, loss and damage will result to plaintiff, Elsie Mary Jane Leger, before written notice can be served and a full hearing had thereon, in that defendants have denied General Assistance to plaintiff and left her without sufficient income to support and maintain herself.

Notice and a hearing before entering a temporary restraining order should not be required because time and the immediate jeopardy of plaintiff do not permit such a hearing.

Now, Therefore, on motion of the plaintiff, it is Ordered that defendants, each of them, their agents, servants and employees, and all persons acting by, through or under them or either of them or by or through their order be, and they are hereby, restrained from denying General Assistance to plaintiff, Elsie Mary Jane Leger, solely because she is not a citizen of the United States.

Issued at 12:30 o'clock p.m., this 9th day of December, 1969.

(s) Wood
J.

VIII.

TESTIMONY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 69-2869

Elsie Mary Jane Leger et al.,
Plaintiffs

v.

William P. Sailer et al.,
Defendants

Philadelphia, Pa., March 3, 1970

Before Hon. Harold K. Wood, J.

Present:

Jonathan M. Stein, Esq., and Douglas Dye, Esq., Attorneys for Plaintiffs.

Joseph B. Work, Esq., Deputy Attorney General, Attorney for Defendants.

(2) MR. STEIN: Your Honor, the Leger case involves the citizenship requirement in the Public Welfare Code of Pennsylvania and the sole issue now before the Court is whether a three-judge court shall be convened to hear this case on the merits.

THE COURT: That may be so, but you have been telephoning repeatedly about a class action.

MR. STEIN: Yes, Your Honor. We also have a class action motion and order with us today which we will present to the Court.

THE COURT: How do you think that should be disposed of?

MR. STEIN: Well, Your Honor, that class action order can be disposed of today or Your Honor could take that under advisement.

THE COURT: It can't be disposed of today because you haven't conformed with the rule governing class actions.

MR. STEIN: The rule requires us to file our motion within 90 days of the filing of the action.

THE COURT: That is right. And you are filing it now, today?

MR. STEIN: That is right. We are within 90 days, Your Honor. This action was filed on December 8th, I believe.

(3) THE COURT: Well, I am not going to certify this case to a three-judge court until the class action is disposed of. I don't know what your pleadings say in regard to a class action. All I know is that you are asking for one.

MR. STEIN: Yes, Your Honor.

We have with us today our class action order and motion with a memorandum of law following that. We have submitted a brief with our motion for a temporary restraining order, and we have a brief with our request for the convening of a three-judge court.

THE COURT: Well, I have granted you a restraining order. That question is moot, except that I think I am going to dissolve it today.

MR. STEIN: Well, Your Honor, we have in addition to this request for a convening of a three-judge court a motion to amend our complaint to add a second party plaintiff, a Mrs. Beryl Jervis, who was denied general assistance last Friday as a result of citizenship.

THE COURT: Well, do you want to amend your caption?

MR. STEIN: Yes, we do, Your Honor.

THE COURT: Or add an additional plaintiff?

MR. STEIN: We will amend our caption by adding Mrs. Jervis as an additional named plaintiff, and also extend (4) the temporary restraining order you granted to Mrs. Leger to both Mrs. Leger and Mrs. Jervis.

We have here with us—

THE COURT: Let's take one thing at a time. Let's get back to the class action.

Now, you are required under the rules of the class action to show some proof at least of who the

members of the class are, what right, so to speak, you have to represent them, and several other things. What do you have to say about that?

MR. STEIN: Well, Your Honor, the members of the class I think are very plainly defined in our complaint as being those applicants for general assistance, and that is a category of public assistance in Pennsylvania under the Public Welfare Code.

THE COURT: That isn't definitive enough for me.

MR. STEIN: Well, we have here, Your Honor, the Commissioner of the Office of Family Services in the courtroom today, and he can testify if that is necessary to who this class is and the fact that there is—

THE COURT: That burden is on you; it is not his burden.

MR. STEIN: We are prepared then to call Mr. Cohen to the stand, if Your Honor feels that that is necessary (5) in terms of proving this class.

THE COURT: I don't feel it is necessary; the rules say it is necessary.

Have you read the rules?

MR. STEIN: Yes, we have read the rules, Your Honor, and we have set out in our complaint, Your Honor, the definition of our class and the necessary allegations required by Rule 23(a).

THE COURT: I don't think you have. Go ahead.

MR. STEIN: Well, our allegations in our complaint set down the requirements—

THE COURT: Just a moment, Mr. Stein. You said you have read the rule?

MR. STEIN: Yes, we have.

THE COURT: Doesn't the rule say the complaint shall contain under a separate heading styled "Class Action Allegations"? Doesn't it say that?

MR. STEIN: Your Honor, those rules went into effect, did they not, in—

THE COURT: They are in effect right today.

MR. STEIN: They are, Your Honor, and we can only explain that—

THE COURT: They have been published since January 13.

(6) MR. STEIN: Right. Now, our complaint was filed on December 8, and the complaint was prepared at a time when those local rules were not in effect.

THE COURT: Well, they are in effect now.

MR. STEIN: Yes, you are right, Your Honor, and we would—

THE COURT: Now, if you wish to amend you will have to do it in accordance with this rule.

MR. STEIN: Your Honor, we will be prepared to amend.

THE COURT: That is the first hurdle we have, and if you have read it—there is no use me reading

it to you again—but it says: "Under separate allegations the size and definition of the class, the basis upon which the plaintiff claims to be representative of the class; that the class is comprised of defendants, that their names as parties are adequate representatives of the class; the alleged questions of law and fact claimed to be common to the class, in actions claimed to be maintainable as class actions" and so forth.

MR. STEIN: Yes, Your Honor. We shall amend our complaint along those lines, but I just might point out that your decision as to convening a three-judge court is not dependent on the condition precedent of establishing the class.

(7) THE COURT: There is where we disagree, Mr. Stein, vehemently. If I certify this case, I don't intend to certify it with this tail on the kite, so to speak, as to who the plaintiffs in the case are. Now, it would be utterly ridiculous to send this case to a three-judge court and when they get it down there they don't know who the parties are and whether it is a class action or not.

Now, that is going to be determined first, since you want to make it a class action, which you could have done for months. You are just doing it today. If you wanted to make it a class action, you have had ample time to have that passed on long before now. Now you are coming in here today and asking that it be made a class action, which is your right and duty to do if you think so, but before it is certified that procedural step has to be determined and passed upon, because I will not send it down there until it has been.

MR. STEIN: Well, Your Honor, we are prepared to amend our complaint by specifying those details required by the Local Rules under Class Action. I can only say that we did go by our former practice in another three-judge matter, Williford v. Laupheimer, where the question of finding that it was a proper class action was taken under advisement for the three judges. This was Judge Davis who convened the three-judge court, and the three-judge court later found it was a (8) class action, but we are prepared to do this now.

THE COURT: If that was done I am not aware of it, and I certainly don't question what you are saying, but as far as I am concerned—and I am surprised that the record went down there in that shape—it certainly isn't the obligation or duty of a three-judge court to determine what should and what should not be a class action. You are aware of that, I am sure.

MR. STEIN: Well, yes, Your Honor, but the three-judge court, of course, in deciding questions on the merits, one of those questions would undoubtedly be the matter of a class action.

THE COURT: Well, there is nothing in the Act or anywhere else that says the three-judge court should determine what is or what is not a class action. There is only one thing there to decide, and that is whether there is a constitutional question which raises a substantial federal question.

MR. STEIN: Exactly.

THE COURT: That is the only thing it is convened for, except in Interstate Commerce matters.

MR. STEIN: Well, Your Honor, we are prepared at this moment to argue the question of whether a three-judge court can be convened.

(9) THE COURT: Well, as long as you are here I will hear it, but I will not pass upon it until I have determined whether or not this is a proper class action. If you wish to argue it, since you are here, on the three-judge court, why, I will hear it.

MR. STEIN: Thank you, Your Honor.

THE COURT: Incidentally, you didn't file any brief, nor did the Commonwealth, in regard to this three-judge court.

MR. STEIN: Well, I believe within two days following our filing of the complaint we submitted a brief.

THE COURT: You submitted a memorandum of law in support of the motion for a three-judge court.

MR. STEIN: That is right.

THE COURT: The Commonwealth hasn't filed anything.

Go ahead.

MR. STEIN: Well, Your Honor, the standards set out for convening a three-judge court as defined in Section 2281 of the Judicial Code, and under the leading Supreme Court case, Idlewild Liquor Corporation, really set down two requirements: One, that a statute that is the subject of a suit which is seeking to be enjoined in terms of its unconstitutionality, and

two, that the question raised in the complaint is a sub-
(10) stantial constitutional question.

On the first point, Your Honor, I think it is quite clear that we are challenging a statutory provision of the Public Welfare Code, Section 423, which requires as a condition precedent to someone receiving general assistance that that person be a citizen of the United States.

On the second point, the Supreme Court has in looking to this standard of the substantiality of the constitutional question, has said that only where the question is plainly insubstantial or clearly without merit or foreclosed by former cases of the Supreme Court should a judge not convene this three-judge court.

Now, in our case I think the Supreme Court case law is clearly in support of plaintiff's contention. On the first ground that we raise, the equal protection claim, that this citizenship requirement is an invidious discrimination against resident aliens lawfully in Pennsylvania, we have first the line of cases beginning with Yick Wo v. Hopkins, which holds that the Fourteenth Amendment is applicable to aliens. No person shall be denied equal protection of the law, and Yick Wo and cases since then in the Supreme Court have held that that is applicable to aliens, the equal protection clause, the due process clause.

That line of cases is supplemented by the Shapiro
(11) v. Thompson case decided by the Supreme Court one year ago, which struck down residency requirements in public assistance. The Supreme Court there affirmed actually an Eastern District opinion,

Smith v. Reynolds, which struck down the Pennsylvania residency requirement for public assistance, and this latter case is quite on point, because Justice Brennan says there very clearly that a state cannot really fence out indigents from the state, and in going down the various possible state interests, he found really no compelling interest to justify this kind of barrier at the borders of a state.

That, Your Honor, is really our main contention. That is an equal protection claim that plaintiffs present.

The second ground is that the supremacy clause, Article 6 of the Constitution, prevents states from placing discriminatory burdens upon aliens. The regulation of aliens is of course a matter for the federal government to regulate, and there is a substantial law passed by Congress to regulate aliens' admission into the country and their conditions of entry here.

The Supreme Court has on a number of occasions struck down state statutes which put burdens upon resident aliens lawfully in the United States. Truax v. Raich and Takahashi v. Fish & Game Commission, to cite two examples.

What the citizenship requirement of public (12) assistance is is tantamount to really Pennsylvania saying who can in effect be here and live here with a minimal amount of subsistence and a minimal level of subsistence, and they are in a sense asserting the right of who can abide in Pennsylvania. The result of this is that people lawfully admitted under Act of Congress to Pennsylvania are in effect denied the

right to live here and are in fact forced to live in other states that are more hospitable to that individual.

That is really the reasoning set down in the Truax cases and the other cases holding that state attempts to regulate aliens in the state must fall under the preemption doctrine, under the supremacy clause.

The Pennsylvania Alien Registration law was one of these laws struck down in Hines v. Davidowitz, and this is set down in our brief.

Finally, we just wish to point out that three-judge courts have been convened on matters like this. Probably the best example in this District is the residency case itself, Smith v. Reynolds, which was affirmed in Shapiro v. Thompson.

For these reasons we feel that a three-judge court should be convened, and this argument is set down in more detail in our brief.

I wish, though, to bring to the Court's (13) attention today a request for a restraining order for a Mrs. Beryl Jervis, an alien denied public assistance, general asistance, on Friday. Our order reads that the original order for Mrs. Leger should be enlarged to include Mrs. Jervis, who is a 57-year-old woman, unemployed, was very seriously ill and has really absolutely no resources and no income to depend on. She is destitute in the literal meaning of that word, and we just asked the Court today for an order to restrain the Department from denying assistance to her until the issue can be heard on its merits in terms of the constitutionality of this requirement.

Our order also includes our motion to amend our caption to include Mrs. Jervis along with Mrs.

Leger as two named plaintiffs in the suit. Our motion is followed by an affidavit from Mrs. Jervis setting down the facts in her case and certification from counsel as to the notice we provided the Department of Public Welfare on this matter.

THE COURT: Well, I will of course hear from the Commonwealth, but in regard to the restraining order, I am a little disturbed about it because whether the record shows it or not, I recall distinctly that when I issued the restraining order in the case of Elsie Mary Jane Leger I did so because there was little or no opposition to it and because, more importantly, it was de minimis. Now, this case through no (14) fault of the Court, obviously, has been here since December 9, 1969—at least that is the date of the first order which I signed; so it is at least December 9th.

Let me see when the complaint was filed.

MR. STEIN: I think, Your Honor, December 9th was probably the filing date, too.

THE COURT: As I say, I issued that restraining order because I thought it was de minimis and I thought that this matter was of such apparent importance it would be disposed of within a reasonable length of time, and I don't call this a reasonable length of time. We are into March now and we are here to dispose of the matter and you come in here today with an amendment, and not only an amendment as to the other woman, but also as to the class action.

Now, this matter appears to me to be dragging out unnecessarily, and unless the Commonwealth

agrees—and it is up to them to make the decision—I am going to dissolve the restraining order.

MR. STEIN: Your Honor, if I might just speak to the de minimis point that you raised?

THE COURT: To say nothing of entering another one.

MR. STEIN: May I speak to the de minimis injury point that you did raise? The amount of money (15) involved I believe for Mrs. Jervis does not amount to any more than $180 a month. I believe for Mrs. Leger it may have involved perhaps $130 a month. We are now prepared to move as expeditiously as possible.

THE COURT: You are not prepared. You could have been prepared to move expeditiously. We could have disposed of this today. You are not prepared to proceed expeditiously when you come in here on March 3rd and tell me that you want to amend your complaint and that you want to raise the question of whether or not you have a class action. That isn't being expeditious.

We could have heard this on quite a few occasions. My law clerk called you or my secretary called you and told you that we were prepared to proceed to dispose of this, but it was just put off and put off.

MR. STEIN: Your Honor, that is precisely the issue. By disposing of it, our point earlier in our conversations with your clerk—and initially, in fact, we raised this in chambers with you—that this issue being in the case, it could not be disposed of by a single judge because it is a three-judge court matter.

Now, we were prepared sometime earlier to argue this case initially on the three-judge court question, and I think—

THE COURT: You weren't, though. Read my last (16) order. That followed another request for a continuance. I told you then—and the order so states —that it would be listed sometime after the 16th. There was no other time to list it until then.

MR. STEIN: Your Honor, the only request we made for a continuance went to Adens, the second case on the list for today.

THE COURT: This matter could have been argued a week after you filed it. That is why I considered it de minimis. I don't call from December 9th to March 1st de minimis. You could come back with that same argument six months from now and say, "It is de minimis because of the small amount involved in money". It is a legal principle, it isn't the money.

MR. STEIN: Well, Your Honor, on the hearing you set for January 16th we were prepared to have our argument on the three-judge question. That is just a matter of weeks after filing the action, and we greeted with some surprise your order continuing this matter, the Leger matter, to another date, because our letter to you only made a request for a continuance as to Adens.

THE COURT: Well, I won't argue with you on that. I know in my own mind very definitely—and I am sure the record will disclose it—that you haven't been prepared (17) to proceed until today, and now

that you are prepared to proceed, as I say again, you are in here with amendments to be ruled upon, particularly a class action to be ruled upon, and certainly the delay, if there has been any, has not been the responsibility, or the blame can't be placed on the Court, because I have been prepared to hear this from the day you filed it, and I told you that.

MR. STEIN: Your Honor, our only explanation is that we did rely upon prior practice and we can only express our regrets for the lapse.

THE COURT: I am not being critical. I am not saying you haven't done the best you could. We are back to this question of de minimis. You know a restraining order is a very, very extreme remedy. It is only available in very few cases and situations out of hundreds. I allowed it because I considered then it was de minimis in view of the short time that would elapse before the matter was adjudicated.

MR. STEIN: Yes, Your Honor, and I believe that the harm is still de minimis precisely because of the small amount of money involved, weighed on the other side from the real irreparable harm which would come to someone who must go without food, who as our affidavit and motion show may soon get evicted by a constable.

THE COURT: Well, in addition, if I am not (18) mistaken—you tell me if I am—in addition to your request for a three-judge court you also asked for a restraining order and a preliminary injection, didn't you?

MR. STEIN: Yes, Your Honor.

THE COURT: Then why didn't we have a hearing on the preliminary injection?

MR. STEIN: Because, Your Honor, only a three-judge court in our opinion can hear the question.

THE COURT: Then why do you ask me for one if only a three-judge court can decide that?

MR. STEIN: I think we did ask you initially for the convening of the three-judge court.

THE COURT: You asked more than that. You asked for a restraining order and a preliminary injunction.

MR. STEIN: Precisely, Your Honor, because the statute, 2284, the three-judge court statute, empowers the single judge to grant whatever temporary relief is required up until the convening and the hearing on the merits on the question.

THE COURT: And I did grant temporary relief, didn't I?

MR. STEIN: Yes, you did grant temporary relief.

THE COURT: Now there is the question how long (19) is temporary?

MR. STEIN: Exactly, Your Honor, and the statute, 2284, sets no 10-day or other time limit, other than the limit that temporary relief can be granted up to the hearing on the merits by the three-judge court on the issues.

THE COURT: I have no evidence before me, Mr. Stein; I have no evidence before me on which I could base either a continued restraining order or a preliminary injunction pending the decision of the three-judge court.

Now, you know and I know that assuming I certify this, before a three-judge court is convened and hears argument and files an opinion it is likely that a year may go by, quite likely, because we are flooded with three-judge courts and we are flooded with all kinds of other work.

MR. STEIN: Yes, Your Honor.

In terms of the evidence as to harm to Mrs. Jervis, I think her affidavit taken under oath of course sets out the facts and gives you the factual basis for deciding whether there is irreparable harm in her case.

In terms of the time of the three-judge court reaching a decision, again we can only point to our prior experience here where a three-judge court has heard matters and decided the cases completely, public assistance cases, in this District in a matter of one, two or three months.

(20) THE COURT: Well, maybe so in public assistance cases. I wouldn't quarrel with you because I don't know, but I have sat on a great many three-judge courts and that hasn't been my experience.

MR. STEIN: Right. I just have referred to the Williford and Caldwell cases, but, Your Honor, I just might make a further point that we are not seeking at this point class relief, temporary class relief.

We are only seeking it for two named individuals at this point, and in the Smith v. Reynolds case, that was the Pennsylvania residency case, the Court in ordering a preliminary injunction against the state welfare statute found de minimis injury to the state where the total number of people involved there was undoubtedly much greater than the number of resident aliens to be affected here.

In fact, we have really two now before the Court, and when the Supreme Court decided that case in Shapiro v. Thompson, they said very clearly that the saving of welfare costs is not a justifiable state interest to base an invidious classification upon.

So I think in terms of cost to the state—and perhaps the Attorney General's office and the Attorney General's representative here can address himself to that—I don't think the cost to the state really is great, particularly (21) compared to the harm which these two individuals, Mrs. Leger and Mrs. Jervis, would suffer without any funds.

THE COURT: Well, how long have they been getting funds?

MR. STEIN: Well, Mrs. Leger of course has just been getting assistance since your order of last December, so she has received assistance for approximately two or three months.

Mrs. Jervis hasn't received anything from public assistance. She became unemployed a number of weeks ago and just exhausted all of her resources, in fact. She wants to get back to work. Right now she is just too sick. She doesn't even have carfare to look

for a job. So conceivably this lady could be employed and get back into the employment market if she had enough money to maintain her health and to allow her to look for work. So I don't think that this is particularly the type of person who would be on assistance for any great length of time.

THE COURT: Are those statements supported by the record?

MR. STEIN: Yes, in the affidavit, Your Honor, we set that out.

THE COURT: Well, let me hear from Mr. Work. First address yourself to this restraining order.

(22) MR. WORK: I beg your pardon, Your Honor? I didn't hear you.

THE COURT: First of all address yourself to the status of this restraining order.

MR. WORK: Well, Your Honor, first of all let me make it quite clear that with respect to the story which counsel for the plaintiff tells, my heart is as big as anybody's. I appreciate that many cases which plaintiff's counsel brings before this Court and other Courts, there is hardship involved. Unfortunately, Your Honor, the Commonwealth appears any more to be viewed as a bastion of unlimited funds. Any time that any hardship is involved the Commonwealth is called upon to respond through the method or device of a temporary restraining order which then usually goes on into a motion for a continuation of the preliminary injunction until we get to a final hearing.

Maybe it is fine to say that in one case we are talking about an individual and we are talking about

$184. However, over the course of the last six months, Your Honor, we have been talking about thousands of people and we have been talking about millions of dollars.

Therefore, on the part of the Commonwealth, quite frankly, Your Honor, as Your Honor is well aware, the granting of a temporary restraining order has the effect of (23) a mandatory injunction and the Courts have consistently held that they should not be granted unless it appears that the question is free from doubt.

Frankly, Your Honor, I have read the affidavit, I appreciate that the facts set forth in the affidavit may or may not constitute undue hardship.

THE COURT: I want to get a meeting of the minds with you on one thing. I don't think the law is that the case should be free from doubt. I think the terminology is that there is a likelihood they may succeed at the final hearing.

MR. WORK: I subscribe to Your Honor's statement. I put it in the wrong context, Your Honor.

THE COURT: That is all right.

MR. WORK: On the continuation of the temporary restraining order which is already in effect, Your Honor, I have grave doubts about that as well, because as Your Honor has already pointed out, we have been treating this case from its inception, at least as far as I was concerned, as being a case in which the plaintiffs had made reference to class action in one paragraph of their complaint, we had been treating it from its inception as a case involving

Mrs. Leger in which a decision would eventually be reached with respect to the validity of the Commonwealth's position under the statute.

(24) THE COURT: So have I, Mr. Work, until last week.

MR. WORK: We are now faced with a motion for such a class action without any proof whatsoever that such a class exists outside of the existence of one more plaintiff. We are faced with a motion for a new restraining order with respect to the added plaintiff. There is nothing in my mind which prevents plaintiff from coming back two months from now and saying, "Let's grant the TRO for the entire class if it exists."

This, Your Honor, quite frankly on behalf of the Commonwealth, I can't subscribe to. The decision is Your Honor's, but the Commonwealth cannot agree to either course of action.

THE COURT: Well, you used the term "mandatory injunction". That is about as near as I could describe it. What your opponent in fact is asking me to do, particularly in the case of the second plaintiff whose name escapes me, but in that case what he is practically telling me to do is to order you to put her on the assistance rolls and again to pay assistance to her, notwithstanding at this moment that is contrary to the law.

MR. WORK: That is correct, Your Honor. As Your Honor recalls, I pointed this out to Your Honor at the (25) time that the TRO was granted in the Leger case but advised Your Honor at that time that

because of the unique circumstances that I was not going to vehemently oppose the Court's granting of the temporary restraining order.

THE COURT: I recall that, and that is why I granted it, because I thought this issue would be resolved very soon and I didn't want that woman to suffer unnecessarily, but there is a limit to what I can do. I don't feel that I have the right to tell the Commonwealth to do something contrary to existing law, which is about what I am doing.

Well, then, in summary on the restraining order, do I understand that you oppose a continuation of the restraining order as to Mrs. Leger?

MR. WORK: Yes, Your Honor, I do.

THE COURT: I will rule right now that I will allow this other plaintiff to be added. I am not passing on the class action, obviously, but as an individual she can be added as a plaintiff. In that regard the pleadings are amended.

This poses quite a problem. What was the status of Mrs. Leger when this complaint was filed?

MR. WORK: As I understand, Your Honor, your court was advised at that time that there was an eviction (26) notice to be served the next morning, as I recall, and the fact that she had for some period of time been without funds, although at that time, as Your Honor recalls, her husband I believe was receiving public assistance.

THE COURT: But she was not on the relief rolls.

MR. WORK: She was not on the relief rolls at that time, Your Honor.

THE COURT: So that as of that time she was in precisely the same status as the added plaintiff is now.

MR. WORK: That is correct, Your Honor.

THE COURT: Well, I am inclined to think I was wrong then. I don't want to compound the felony.

Let me hear from Mr. Stein on this restraining order, and then I want to hear you on the class action.

Do you have anything you want to add, Mr. Stein? I am really disturbed about this.

MR. STEIN: Well, Your Honor, I would like to address myself to the point that you stated earlier, that you felt that in making this decision it would be contrary to law.

I think we have established in our argument and brief that in effect there is a very strong likelihood of our succeeding on the merits in this case. I think the argument is in terms of the equal protection clause (27) invalidating discrimination against aliens and the supremacy clause preventing states from putting burdens on aliens, and this is the Supreme Court case law running to the entire Twentieth Century, back to Yick Wo v. Hopkins over a hundred years ago. That law is very clearly established and I think would contemplate a court here in the Eastern District striking down the citizenship requirement in general assistance.

Now, one must remember that—

THE COURT: You think you are going to be successful, but I don't know whether you are or not.

MR. STEIN: Your Honor, I think Judge Joseph Lord was put in a similar position when the residency case was filed. The Pennsylvania residency case was filed in 1967 in this District and he did grant a temporary restraining order on behalf of named plaintiffs before, of course, the case was heard on its merits, and in light of the very specific statutory provision which said—

THE COURT: Judge Lord was in a little better position than I am. I recall the case. Judge Lord had a lot of facts before him and he could, perhaps, look to the future and conclude, and not only that—that raises another question—but if I am not mistaken, Judge Lord decided that case himself. Now here you are asking for something different. I don't know why you didn't want it then and (28) apparently you don't want it now, but this matter could have been disposed of by me. You don't have to have a three-judge court to determine this question.

MR. STEIN: To determine the question of a temporary restraining order, you are right, Your Honor, a three-judge court is not necessary.

THE COURT: I can determine that the Act is unconstitutional, too.

MR. STEIN: But I believe that the three-judge court Statute, 281, prevents you from enjoining it on the basis of its unconstitutionality.

THE COURT: I don't agree with you on that. Almost weekly it seems to me an individual judge on this court can declare an Act unconstitutional.

MR. STEIN: But declaring might be different from enjoining. Enjoining is the express language.

THE COURT: He can enjoin, he can enter a permanent injunction, he can declare the Act unconstitutional. There is nothing mandatory about submitting an issue of constitutionality to a three-judge court. It is optional.

MR. STEIN: Your Honor, the very clear language of 2281 is that an interlocutry or permanent injunction restraining the enforcement operation or execution of any state statute by restraining the action of any officer of such (29) state in the execution or enforcement of such statute shall not be granted by any district court or judge upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under Section 2284.

THE COURT: That may be so; I don't question that, I don't question that at all. What I am saying is that our Court repeatedly declares Acts unconstitutional, a single judge, repeatedly.

MR. STEIN: Well, Your Honor, this is particularly—

THE COURT: As a matter of fact, didn't Judge Lord do exactly that?

MR. STEIN: No, Your Honor. In the residency case Judge Lord as a single judge granted temporary

relief, really the exact same temporary relief we are seeking here, and then had applied to the Chief Judge of the Third Circuit for the convening of a three-judge court, and it was the three-judge court which granted a preliminary injunction in that case, the Pennsylvania residency case, affirmed by the U. S. Supreme Court two years later.

Now, Your Honor may be correct, though, in saying that perhaps you can hear our request for a preliminary injunction and the hearing itself may be presided by a single (30) judge, but the actual decision on the merits enjoining the statewide statute must be a decision of the three-judge court, and we are prepared, Your Honor, to present evidence as soon as Your Honor wishes to schedule the hearing, either a hearing for—

THE COURT: All right, we will get to that, but I will look back on it and I am sure you have a better recollection of it than I do, but it seems to me that Judge Lord himself stated that the Act requiring that citizens or persons had to be a resident of this state for a certain length of time before they could receive assistance was unconstitutional, and that was Judge Lord's own opinion, if I am not mistaken.

MR. STEIN: Yes, he did write the opinion of the three-judge court, but he was joined by at least one other judge in that majority opinion. He also may well have in granting the temporary restraining order found that threshold question that there was a good chance that the plaintiffs would succeed, at least they had a meritorious claim, and I might direct myself to that at this moment.

Federal courts throughout this country have granted, and particularly in this Eastern District, have granted temporary restraining orders for public assistance plaintiffs pending the determination of the case on the merits.

(31) THE COURT: I am aware of that, but there are a number of cases which aren't quite as strong in convening a three-judge court as the case you are citing. I also know from personal practical experience that our Third Circuit Court of Appeals looks very much askance at our judges, my colleagues, certifying cases down there willy-nilly, on the bare statement of the plaintiff's attorney that a substantial federal question is involved. I know they do because they told me more than once.

MR. STEIN: Right. And often in terms of, for example, our experience with Judge Davis, who convened a three-judge court in the Caldwell matter and the Williford case, a hearing was held like this with briefs submitted on the three-judge question, and in those cases Judge Davis did seek the convening of a three-judge court.

THE COURT: Well, sure, we have three-judge courts all the time. I am involved in two. We must have ten of them here right this moment.

MR. STEIN: Right, but these were cases—

THE COURT: But each case is different. Now, why Judge Davis ordered it might have some bearing on this case or it might not, I don't know.

MR. STEIN: Well, the issues raised there were equal protection issues very similar to the one before this (32) Court.

THE COURT: Equal protection, you always put that in. Don't stress it too much. You could say that in practically any case you bring in here.

MR. STEIN: We have in particular in mind the residency case, Your Honor, as the standard here. That is really our main source of law in this area.

If I might just direct myself very briefly to the class action question you had raised earlier, we still feel that our allegations in our complaint meet the requirements of Rule 23, the Federal Rules of Civil Procedure, and as Your Honor did point out, the local rules changed after we filed our complaint and I don't think there was any kind of retroactive provision in those local rules which said that complaints filed before the rules would conform.

THE COURT: Mr. Stein, we won't waste much time on that. That rule was adopted sometime prior to January 13. I just don't know the date, but at least it was published on January 13, and that rule of our court is effective today insofar as I am concerned, and if you want to make this a class action you will have to comply with the strict provisions of that rule and I will expect an answer from the Commonwealth, and if I can determine it on the basis of what you have filed, I will. If I can't you will have to come in and substantiate (33) your allegations by testimony.

MR. STEIN: Your Honor, that is perfectly acceptable to us.

I think the last question really is the question of the temporary restraining order for Mrs. Jervis.

THE COURT: That is what is disturbing me. I want to look at the record in Judge Lord's case, but

as I understand it, you are telling me that Judge Lord issued a restraining order and/or a preliminary injunction?

MR. STEIN: Well, I believe he issued a restraining order. The preliminary injunction came later.

THE COURT: Did he issue a preliminary injunction, or did the three-judge court issue it?

MR. STEIN: The three-judge court issued the preliminary injunction.

THE COURT: And all Judge Lord did was issue a restraining order and allowed it to continue until the case was disposed of by the three-judge court?

MR. STEIN: Exactly.

THE COURT: I remember reading Judge Lord's opinion very carefully, and the opinion that I am referring to must be a different opinion than the one you are referring to, because that was his own opinion, as I recall it.

MR. STEIN: Yes, you are right, it was his own.

(34) THE COURT: It wasn't the opinion of a three-judge court. He said that the Act was unconstitutional, fixing a definite time within which a person had to be a resident of this state before they could obtain relief. I could be wrong, but my recollection is that that was his own personal opinion.

MR. STEIN: Well, yes, Your Honor, but perhaps, irrespective of that, as I say, we are just seeking temporary relief today on behalf of Mrs. Jer-

vis, and if Your Honor feels that a hearing is necessary on the question of granting temporary relief, we would be prepared as soon as a hearing can be scheduled to submit all the testimony.

THE COURT: I don't know what a hearing would do, because there is no disagreement on any facts. Mr. Work doesn't attack your affidavit. We all seem to agree on the facts, that she is an alien, she is not getting relief and she needs relief. What else could you prove factually?

MR. STEIN: Right. I think I am in agreement with you there, Your Honor.

The other question is whether we have shown in our complaint and in our brief, the earlier brief for the temporary restraining order which we submitted initially when we filed our complaint, whether on the face of that there is a likelihood that we will succeed on the merits (35) ultimately.

THE COURT: That is one thing. You know maybe better than I do that there are three or four criteria. One is that there is a likelihood that you may succeed eventually. Another one is whether the person is suffering irreparable harm, and there are one or two others, but those are the most important.

MR. STEIN: Right.

THE COURT: What is disturbing me is that what I am doing in effect, as Mr. Work says, it is practically a mandatory injunction and the result of it is that I am directing the Commonwealth of Pennsylvania to put a person on the relief rolls, pay them relief, when as the law stands as of now that is contrary to the law, the existing law.

MR. STEIN: Right, Your Honor, but as one must point out, a temporary restraining order does not decide the issue on its merits. It can lapse at a later point, it cannot be used as precedent that this is an unconstitutional statute. It can be read very, very narrowly, that just at this point irreparable harm was shown and there was a colorable basis both upon argument and the pleadings that plaintiffs might succeed when the case is heard further on its merits.

THE COURT: All right. We will get over those two hurdles, perhaps, but supposing you kept coming in here (36) every day for the next six months—and this isn't beyond belief the way these papers are filed, some of them—you could come in here almost every day and add another plaintiff. You want to add a whole class. Supposing you came in here tomorrow with Mrs. Jones and asked for a restraining order and the next day with Mrs. Smith and asked for a restraining order?

MR. STEIN: I don't think that the class is that large, but I would—

THE COURT: No, I am talking about the individual. You have added one this morning, and this may be illogical, or maybe I am dreaming or something, but you could come in tomorrow and ask for another alien, you could come in the next day and ask for another one, and if it applies to Mrs. Leger and the other lady, why wouldn't it apply to them?

MR. STEIN: Well, Your Honor, that was precisely Judge Hannum's concern in the Lennox v. Schwab case, the confession of judgment case which is now before a three-judge court, and although I

think that case is different just in terms of the class being that much larger and many more people being affected by confession of judgments than the aliens, and I think they number quite a few who would be eligible for public assistance, there Judge Hannum established the procedure, and we have submitted in our papers as Exhibit 1 to our motion (37) to amend the caption his order which establishes that upon certification of counsel that a particular individual is a proper member of the class and falls within that action, that that named individual without having formal intervention papers or another motion to amend can be certified to the Court and filed with the clerk's office and have that individual fall within the original order.

We are as anxious as Your Honor is to hear the case on the merits, get to a final decision, and we sincerely believe that this case can be heard on the merits in a very short time.

THE COURT: By a three-judge court?

MR. STEIN: That, of course, as Your Honor knows, is dependent upon the timing schedules of two other judges.

THE COURT: I know very well from my experience here for more years than I like to think about that you are not going to get a three-judge court overnight, even though I certify it, with the work that they have to do down in the Third Circuit and the calendars that we have now, particularly on the individual calendar systems. I would think you would be lucky if you had it heard in three months.

MR. STEIN: Your Honor, in that case, then, Your Honor may decide that you wish to hear the testimony and hold the hearing yourself, and then we can submit briefs or (38) schedule oral argument for the three-judge court.

THE COURT: What testimony would you think I should hear in order to determine whether it should be certified?

MR. STEIN: Your Honor, we really would call perhaps just two or three witnesses. I think one would be a spokesman for the Department to perhaps explain what state interest is involved in having a citizenship requirement and perhaps describing to the Court the kinds of people affected by this requirement, and then perhaps just another witness who might testify that there are just no other resources available for an alien other than public assistance.

THE COURT: Now you are talking about the certification.

MR. STEIN: Well, I am talking now about an evidentiary hearing which Your Honor as a single judge could hold pending the final decision on the merits by the three-judge court. That is perhaps one way of expediting the entire case.

We would of course use as much discovery as we can to further expedite the matter, but in terms of the length of the temporary restraining order, I think that is part of the judge's concern, and I don't think that the restraining order would have to go in to any long duration. I can assure you that we are prepared—

(39) THE COURT: Now, another thing. I want some sort of a record here so we can dispose of this thing. If these people are entiitled to relief they should have had it before now. If they aren't, this thing ought to be terminated. But supposing you came in here a week from now, we will say; supposing I determine that there is a class action here and you brought it properly, you have amended it, and you come within the rule and Section 23, but in any event you have complied with all of that and I determine that it is a proper class action. Would you come in then and ask for a mandatory injunction or restraining order compelling the Commonwealth to pay all the members of that class?

MR. STEIN: No, we would not seek class relief.

THE COURT: They are all in the same category. Why would they be any different than the two you have here now?

MR. STEIN: Well, Your Honor, in fact we did make an initial request for class relief based upon existing precedent of class—

THE COURT: It is in the body of your complaint?

MR. STEIN: Right. And that in fact Judge Davis just a few months ago did grant a class temporary restraining order. He held a hearing as a single judge in a three-judge matter, granted a temporary restraining order—this is in (40) Williford v. Laupheimer—pending the three-judge court hearing on the merits.

I don't really think that it is particularly crucial to seek a class temporary relief restraining order in the Leger case, because I don't think that our class is really all that large. I don't think there are hundreds and hundreds of recipients across the state, but we cannot foreclose the possibility that there will be perhaps a couple of individuals who may find themselves out of work suddenly or deserted by a husband—

THE COURT: That is just the point. That is what disturbs me. That is just what I said a few minutes ago. If every time you find somebody else who doesn't have a job and you come in and ask me for a restraining order, I can't treat one any differently than the other.

In effect what you are asking me to do is to be prepared any time you come in here and ask for relief for Mrs. Smith and Mrs. Jones or the entire class, that I am faced with the fact as to whether or not I should rule that they are entitled to immediate relief. I can't say no when I have already done it for Mrs. Leger.

MR. STEIN: Well, Judge Hannum, as I said, established the procedure of having counsel certify to the Court as to the facts of the particular named plaintiff. That (41) forecloses the necessity of having a motion to intervene or a motion to amend or a hearing.

THE COURT: That is very acceptable, very reasonable.

MR. STEIN: Right, but I think we might be able to just expedite this whole matter so that we are not faced with the situation of having—

THE COURT: You could expedite it very quickly if I would say, "I will grant a restraining order to every person in Pennsylvania that is in the same category as Mrs. Leger," but I can't bring myself to do that. That is what Mr. Work is pointing out. He said that this is not Fort Knox, there has to be a limit some place as to what the state can do.

MR. STEIN: Right, but as we have noted earlier, I believe, we are just seeking relief which we consider the U. S. Constitution requires, and we are not seeking the Legislature to appropriate more money, necessarily.

THE COURT: Of course, that isn't sensible. If you are asking them to increase their relief rolls by any number from 1 to 5,000, 10,000, 20,000, that increases the expense to the state. You can't avoid that.

MR. STEIN: Yes, Your Honor, right, but I can only point out again to the language in Justice Brennan's (42) opinion Shapiro v. Thompson. He says very clearly that the saving of welfare costs—

THE COURT: Oh, ultimately, of course. Ultimately it isn't a question of expense, but it is a question right now as to whether the single judge on a restraining order should say to the Commonwealth of Pennsylvania, "Increase your relief rolls by whatever number are in this class."

I don't know how many it is, but let's assume there are 5,000; whether I should do that in view of the fact that the law as I sit here says otherwise.

MR. STEIN: Well, Your Honor, as I said, we just have one individual now in addition to Mrs. Leger, Mrs. Jervis.

THE COURT: I know. We have two now.

MR. STEIN: We have two, right?

THE COURT: There is no use in your repeating it because we are not getting very far, but you have two now. My problem is that maybe in a week you will have 2,000, I don't know.

MR. STEIN: I can assure you that that is a hypothetical which just will not arise here in Pennsylvania.

THE COURT: Do you have anything you would like to say, Mr. Work? I would like to hear you briefly on this class action buisness. Do you have anything more to say about (43) restraining order?

MR. WORK: No, Your Honor, I have nothing further on the restraining order. I would be repeating myself.

THE COURT: All right. I will hold it under advisement. My decision will be based largely on what develops in the future regarding the class action. As I say, the class action has to be determined before I consider whether or not I will certify this case. I haven't decided that by any means, and I haven't decided that I won't, but I am not going to decide either way until this question of the class action is

determined. You gentlemen better get together and work on that and let me know whether you want to have me decide it on the record or whether you want to present testimony. In the meantime I will hold these two restraining orders, the one now in effect, and the one requested, under advisement.

Now is there anything further in the Leger case?

MR. STEIN: No, Your Honor.

THE COURT: Are we all clear now on future procedure?

MR. STEIN: Yes, Your Honor. We will submit an amendment to our complaint.

THE COURT: All right. You discuss with Mr. Work the question of how you want the class action disposed of, whether on the record or by oral testimony. If you want (43-A) to present testimony, why, I will have to hear it and then make a decision.

If there is nothing further now in the Leger case and there is no misunderstanding, why, we will take a recess for 15 minutes and then we will hear the Adens case.

[Caption Omitted]

Philadelphia, Pa., April 6, 1970

Before:

Hon. Arlin M. Adams, Circuit Judge.

Hon. Harold K. Wood, District Judge.

Hon. C. William Kraft, Jr., District Judge.

Appearances:

Jonathan M. Stein, Esq., and Douglas G. Dye, Esq., Attorneys for plaintiffs.

Joseph P. Work, Esq., Deputy Attorney General, Attorney for defendants.

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(3) JUDGE ADAMS: These are the cases of Elsie Mary Jane Leger and Beryl Jervis versus William P. Sailer, et al.

Are counsel ready on both sides?

MR. STEIN: Yes, Your Honor.

MR. WORK: Yes, Your Honor.

MR. STEIN: May it please the Court, I am Jonathan Stein, counsel for plaintiffs in this matter. Before the Court are motions for Declaratory Judgment and Preliminary and Final Injunction.

I might add that we have submitted a draft order pursuant to Rule 65(a)(2) to consolidate the application for preliminary injunction and the trial on the

merits. Counsel for the Commonwealth has agreed to that and we have submitted the draft orders to the Court.

JUDGE ADAMS: Is that correct, Mr. Work?

MR. WORK: That is correct, Your Honor.

MR. STEIN: Before the Court today is a class of claimants for general assistance in Pennsylvania who meet all of the eligibility requirements for general assistance except for citizenship, and the citizenship requirement is a statutory one passed in 1939 by the Legislature. It was a product of war hysteria and it remains with us today as a statutory requirement of the (4) Public Welfare Code.

Our legal arguments are set out in our brief in some detail.

JUDGE KRAFT: What in the record supports your statement that it was enacted because of war hysteria?

MR. STEIN: We shall prove that through one of the witnesses whom we shall be calling today; our first witness.

Our legal arguments are set out at length in our brief, and if I might just briefly summarize them at this moment: There are three separate and independent claims on which plaintiffs seek relief. The first rests with the fact that this general assistance citizenship requirement poses an unreasonable burden upon the right of aliens to interstate travel, to interstate movement. This right to travel is one basic to our Federal Union, as the case of U. S. v. Guest—

JUDGE KRAFT: Don't you think that argument is a little far fetched, Counsel? How does it affect possibly the right to travel qua right? If it affects anything, does it not affect possibly the inclination or disinclination of persons to exercise that right?

MR. STEIN: Well, Your Honor, where there is a penalty or a chilling effect upon one's exercise of a right, in this case the right to travel, the Shapiro (5) v. Thompson case of the U. S. Supreme Court this past term has said that that itself is an abridgement of that right to travel. We shall show through one of our witnesses that in fact there are aliens who travel interstate, say, from New Jersey or New York coming to Philadelphia—

JUDGE KRAFT: Might it not have a warming effect on aliens in the state to exercise their right by going elsewhere, where there is no such provision in the statute?

MR. STEIN: Well, the penalty and chilling effect is the analysis which the Supreme Court in Shapiro gave.

THE COURT: I know, but counsel in the courts have seized upon this chilling effect expression almost like motherhood in my boyhood days, as if it were something new, strange and startling as a doctrine in the law. I have some grave doubts whether it is a chilling effect on the right to travel or whether it is on careful analysis a little something different.

MR. STEIN: Well, Your Honor, the Supreme Court did pose it on those terms. They also posed it on the deterrence to travel.

JUDGE KRAFT: Yes, I know, but because the Supreme Court did so doesn't make it the word of God. (6) There were earlier decisions by Justices of the Supreme Court of equal ability when Justices of the Supreme Court in later eras disregarded despite the fact that it was an utterance of the Supreme Court.

MR. STEIN: Well, Your Honor, our point is very simply that the effect of the requirement, and in fact its intent resting with the distrust of foreigners, a dislike for foreigners similar to the residency requirement, that that purpose, that effect, is contrary to the constitutional right of travel, that being our first argument, and is separable from the other two.

The second argument rests with this requirement being a denial of equal protection to aliens, and one must first begin here by stating that a special scrutiny is required, particularly in this case, because of the suspect criterion of alienage which the Supreme Court in Takahashi and other cases has established requires Courts to give particular scrutiny and impose a particularly high burden on states to justify such requirements.

In addition, you have, as some Courts have pointed out, a class that is disenfranchised, a concrete and insular minority, to use Justice Stone's language in the Carlene Products case, and that also requires this Court to look particularly at the justification for this requirement. That this is an invidious discrimination, (7) this class of aliens, the authority for that rests agair with Shapiro v. Thompson, which established that states not only must show a rational relationship to the requirement to justify it, but a compelling state interest.

JUDGE KRAFT: But wasn't Takahashi somewhat different? That didn't apply to all aliens, it applied only to aliens, if I remember the case, who were ineligible for United States citizenship, which immediately, under the law as it then existed, if my recollection serves me correctly, restricted it to certain of the oriental people, including the Japanese, but was inapplicable to the other classes of aliens. Isn't that true?

MR. STEIN: Well, it is true that the class of aliens was somewhat narrower, but at least the principles established in Takahashi I think carry over into this case as they have carried over into other cases decided since Takahashi, that is, that when aliens do come into this country they are admitted to this country lawfully and after that fact they are here to enter and abide and live here on a basis of equality with other people, and that that equality extends to privileges and rights extended to citizens.

JUDGE KRAFT: Then why shouldn't they have the right to vote, if you carry that position to its extreme?

(8) MR. STEIN: There are some very few exceptions, the right to vote being one, which have an historical and constitutional history which just doesn't come through with a welfare requirement such as this, or a requirement for public employment. Voting is one of those few exceptions which don't carry over.

JUDGE KRAFT: Would you put the right to hold public office in the same category?

MR. STEIN: That may be. The limitations, Your Honor, which have been set out go to some job

classifications where citizenship has been a requirement, and some of them may still today be valid, but it seems clear, particularly with the Takahashi opinion, that some of that old case law is very much suspect today, that is, the right of states to set up citizenship requirements for a variety of occupations. Public office may be one which still has validity today, but in terms of the compelling state interest test, which the Shapiro v. Thompson establishes, I think the only state interest involved here is the one of really at best saving welfare costs of the state.

There is a small saving of funds obviously from not providing assistance to aliens, and the Shapiro v. Thompson case holds very clearly that the saving of welfare (9) costs by itself cannot be the basis for an invidious discrimination. It can't be a valid independent basis for that discrimination.

JUDGE KRAFT: What would you think if a state of war happened to exist between the nation whose national the alien was and the United States? Would you think that the state would have no right to refrain from making payments? Would you think the state would have to make the payments or that the Federal Government could enact some provision to prevent transmission of the funds or to have them seized during the duration of the war by an alien enemy property custodian?

MR. STEIN: That power does lie, Your Honor, true, with the Federal Government. I mean, that brings us really to our third point, our preemption argument.

The Federal Government is really the sole regulator in this area and the Federal Government could

set those standards, but I would like to make it very clear that we are dealing with a totally state program. General assistance has no Federal funds in it and it is a total state requirement. Very true there is a substantial scheme of regulation of aliens in the Immigration and Naturalization Law, Title 8 of the United States Code in (10) this area, and the Courts have consistently held that states cannot not only interfere with the Federal law or refrain, rather, from entering into the area of regulating entrance of aliens or the conditions after entry, and we set this out at length in our brief, and I think this is our third claim, that pre-eminent Federal law in this area refrains Pennsylvania from regulating in this area.

I might point out just at this moment that the Hines v. Davidowitz case, one of the leading authorities, dealt with the Pennsylvania Alien Registration Act. That was struck down in 1941. That Act was passed within five days of the general assistance citizenship requirement that is before the Court today, and the basis for striking that down was precisely this preemption ground. The first witness we shall be putting on the stand today will be speaking to the administration of this requirement and the State's rationale for having this requirement.

JUDGE ADAMS: Before you begin with the witnesses, do you want to dispose of the pleading and also the stipulation? Do I understand that you have stipulated certain facts?

MR. STEIN: Yes. We have entered into a stipulation which goes largely to the facts of Mrs. (11) Leger and Mrs. Jervis as the two named plaintiffs.

JUDGE ADAMS: Do we have that?

MR. STEIN: Yes, you do.

JUDGE ADAMS: I was wondering if there is any objection to that.

Can this stipulation that we have be part of the record?

MR. WORK: Your Honor, I may be a little premature here, but I think it is just the time I should call the Court's attention to the fact that I was under the impression that the principal reason for the stipulation of fact was to avoid the calling of witnesses.

JUDGE WOOD: That was my understanding. I was just about to ask why couldn't the facts that you want to present to us this morning have been the subject of a stipulation? What is so unusual about them?

MR. STEIN: Your Honor, there are factual-legal issues, which include irreparable harm which is alleged in the Commonwealth's Answer to our Complaint; there is an aspect of right to travel, and this penalty or deterrent aspect of that, and the facts going to that coming from case records of the Nationality Service Center were not available at that time and it was impossible (12) to stipulate to that.

THE COURT: I don't know why they weren't. The reason I asked you to prepare a stipulation was so we could avoid the necessity of listening to witnesses. Personally, I think witnesses are going to be completely unnecessary. It is purely a legal question. There are no facts in dispute that I can imagine.

MR. STEIN: Your Honor, our only concern is that because there are constitutional issues here, that there is a danger of—

JUDGE WOOD: You are just going to take more of our time.

MR. STEIN: There is a danger of deciding constitutional issues in the abstract, and we would like to make every effort to at least create sufficient background for just what this requirement has been, what its rationale was, and—

JUDGE WOOD: What do you mean by its rationale? It is a statute and it is there, isn't it? We can read it.

MR. STEIN: Right, but what was the intent of the statute?

JUDGE WOOD: The intent of the Statute?

MR. STEIN: Yes. I mean, what did the (13) Legislature in 1939 have in mind? What were the circumstances of its passage?

JUDGE WOOD: That sounds amazing to me. I don't know about my colleagues, but I don't know how anybody can tell what the Legislature had in their mind in 1939.

MR. STEIN: Well, I can assure you it won't be very substantial testimony.

JUDGE ADAMS: How much time do you think you will need?

MR. STEIN: Our witnesses will probably not take more than an hour, and we just have two witnesses.

JUDGE WOOD: An hou

MR. STEIN: It could be less than an hour if the Court deems—

JUDGE KRAFT: Before you get to the testimony, Counsel, if I may interr t, going to your stipulation, there is an allegation here respecting Mrs. Leger, that she is someone's co mon law wife. What possible relevance has whether she is a common law wife or whether she is unmar ed or otherwise married to the determination of th se issues?

MR. STEIN: It is not pa icularly important.

(14) JUDGE KRAFT: T en why is it inserted in the stipulation?

MR. STEIN: Only becau e when both Mr. and Mrs. Leger did apply for assi ance, Mr. Leger was found eligible, Mrs. Leger wa 't.

JUDGE KRAFT: Well, is stipulated that the basis of the refusal of her, wh ther she is unmarried or otherwise, was because she was an alien, so what difference does it make wheth he is a common law husband or whether he got it nd she did not, if the basis of refusal was because e was an alien? Isn't that the issue?

MR. STEIN: Well, it o goes to casting some light on the rationality of th requirement, because it is not uncommon for a hus nd and wife to apply and just to have one spouse found eligible. That has happened repeatedly in t past.

JUDGE KRAFT: It see s to me that you therefore stipulated because it is decorative part of the scene rather than because it germane to the issue.

MR. STEIN: Well, our only claim is that it does show in part that this is a largely arbitrary and irrational requirement.

JUDGE KRAFT: The Commonwealth concedes (15) that the sole basis of refusal was because she was an alien. That demonstrates it more clearly than anything else, but the Commonwealth in effect says that every person who is a citizen of Pennsylvania who meets the other requirements gets it; every person who meets all the requirements, except that of citizenship doesn't get it.

MR. STEIN: Yes, but the Commonwealth has not agreed that this is an irrational requirement with no compelling State interest, and I think this is a particular fact, with many other facts, which shows the statute's irrationality and lack of State interest to really justify this requirement, but I do grant you that in terms of—

JUDGE KRAFT: Has it ever occurred to you in making such a stipulation that you may cause some inquiry to be made by the Immigration Department as to whether this is a meretricious living together or whether it is in fact a common law marriage under the Pennsylvania law, and if they find that it is a meretricious relationship that she may be susceptible of removal from the country?

MR. STEIN: We have made inquiry to the extent that Mrs. Leger was lawfully admitted to this (16) country and is lawfully residing here.

JUDGE KRAFT: That is not what I said. I don't think you followed me.

MR. STEIN: Well, we were aware of this common law marriage as being an element going to legality of residing here, and we found after an inquiry that Mrs. Leger is lawfully here and is lawfully residing here.

JUDGE KRAFT: There is no dispute that she is lawfully here. My inquiry was has it not occurred to you that you may be prejudicing possibly this woman by injecting the common law marriage issue into it? A lot of people call it a common law marriage merely because they live together period. That isn't a common law marriage as I comprehend it in Pennsylvania. If this matter should become one which is the subject of investigation by the Immigration Department and they find she is living in a meretricious relationship and that it is a common law marriage, the very fact that this spectre is injected into it in what I regard as an extraneous and irrelevant issue may ultimately subject her, if they find immorality in the situation, to deportment.

MR. STEIN: Well, Your Honor, there is that conjectural possibility, but at least we are confident (17) that that won't affect her current status in the country.

JUDGE KRAFT: I don't think you have given it much thought, have you?

MR. STEIN: We have given thought to the legality of her staying here.

JUDGE KRAFT: Oh, you have given thought to the legality of one thing, whether she is legally in, and that is not disputed at all. Go ahead.

JUDGE ADAMS: Now, you have two witnesses.

Mr. Work, do you have anything at all?

MR. WORK: No, Your Honor, we have no witnesses.

JUDGE ADAMS: Can you make every effort to keep it as short as possible?

MR. STEIN: Yes, we shall, Your Honor.

JUDGE ADAMS: Because I think it is conceded —and I think Judge Wood has properly pointed out a minute or so ago—that this is pretty much going to be decided on the record that we now have plus the statutes and the previous cases.

MR. STEIN: Right. We shall try to make it as brief as possible.

MR. WORK: Your Honor, at this time may I be entered on the record as voicing an objection to the (18) introduction of testimony because of the fact that the issue is a narrow legal issue which is very clear, and that is whether or not the statute of Pennsylvania violates either the Constitution or the Federal Supremacy Clause.

The Commonwealth has agreed that it does deny to aliens general assistance. With respect to an inquiry into an intent behind the statute, the law is well settled and clear that such an inquiry may not be made. The statutory intent is set forth in the preamble to the statute and the Courts have long said that we cannot inquire behind that to determine what the legislative intent was.

JUDGE ADAMS: Your objection of course will be noted and we will watch the testimony with that objection in mind.

MR. WORK: Thank you, Your Honor.

JUDGE ADAMS: Do we all agree that this is the stipulation that you have been talking about?

MR. STEIN: Yes, sir.

MR. WORK: Yes, sir.

JUDGE ADAMS: The reporter will take it and have it available with the notes.

JUDGE KRAFT: Do I understand that we are (19) reserving decision on the motion to exclude, or the objection? Very well.

MR. STEIN: I would like to call our first witness, Miss Deborah Davis.

DEBORAH DAVIS, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. STEIN:

Q. Miss Davis, can you please state your name and address.

A. Deborah Davis; address, Camp Hill, Pennsylvania.

Q. What is your position with the Department of Public Welfare?

A. I am Director of the Bureau of Assistance, Policies and Standards in the Department of Public Welfare.

Q. And the responsibilities of that position are, very briefly?

A. Developing the rules and regulations by which assistance is granted.

Q. How long have you beer working with the Welfare Department in the State?

A. I have been working with the Welfare Department for 35 years.

(20) Q. Have you been and are you familiar with the workings of the citizenship requirement in the Public Welfare Code?

A. Yes.

Q. Can you briefly describe the characteristics of this class of aliens who have been denied general assistance as a result of this 1939 requirement?

A. Well, generally they are persons who are not old enough for old age assistance, who are not married with families of children, who are not blind or disabled. This makes them generally persons between the ages of 50 and 60, or very young, unmarried, or just recently married persons.

Q. Now, you did mention characteristics, at least requirements like blindness and disability. The relevance of those three or four characteristics is what?

A. There are five categories of assistance in Pennsylvania. Four of the categories have no citizenship requirements. Those four categories have Federal financial participation in them while the general assistance is a State-funded program.

JUDGE ADAMS: Is it correct to say that if there is Federal assistance the citizenship concept is not present?

(21) THE WITNESS: That is what I was trying to say, yes.

BY MR. STEIN:

Q. Now, as to the particular population of aliens, can you speak at all to perhaps their length of stay in the country or characteristics going to their need for assistance?

A. We haven't made any recent characteristic study. Originally what happened is they came to this country in the early 1900's to work in the coal mines and steel mills. In 1924 there was a change in the immigration laws which greatly reduced admissions to the country. Again in 1939 there began to be a movement from countries in which war was being threatened, and as a result of this legislation across the country was being passed to put controls on the services available to noncitizens.

Q. Can you tell us about what time this was done, this reaction to this—

JUDGE ADAMS: That was answered, 1939.

BY MR. STEIN:

Q. Did you say 1939?

A. Yes.

Q. Pardon me.

Miss Davis, have you brought with you as (22) directed any available legal or administrative records, reports or materials going to the rationale or purpose of this 1939 citizenship requirement?

A. Well, we have here a study that was made some years ago in the course of business of the Agency. It is reported that as war threatened—

Q. Before you read from that, was this record made in the Department, a record made in the normal course of business of your agency, and was it the normal course of business of your agency to make such studies or records as the one you have before you?

A. Yes.

MR. STEIN: I would like at this moment, then, to have marked as Plaintiff's Exhibit 1 and entered into evidence this report entitled "General Assistance and the Alien in Pennsylvania."

(Report entitled "General Assistance and the Alien in Pennsylvania" was marked Exhibit P-1.)

JUDGE ADAMS: Any objection?

MR. WORK: Yes, Your Honor. I am going to object on two grounds. First of all, this purports to be prepared by a gentleman by the name of Fielding. The source of the information contained in the said report is not stated. Therefore, I think for that reason (23) it is inadmissible.

I also object to its admission because I fail to see the relevance with respect to the issues before the Court as to the constitutionality of the present statutory section, irrespective of why it was passed, Your Honor.

JUDGE ADAMS: Would you try to find out the answer to the first point Mr. Work raised?

MR. STEIN: Yes.

BY MR. STEIN:

Q. Miss Davis, was the author of that somehow either commissioned by the Department or was that a study which was used by the Department and validated by the Department at that time as a critique or analysis of this citizenship requirement?

A. Yes. It was a study that was used by the Department. The person who made it is Field Secretary for American Service Institute, and it was done at the request of the Department, and the source of information for the sample studies was the Allegheny County Board of Assistance.

Q. And this does contain information going to the administration of this citizenship requirement and the—

JUDGE KRAFT: Counsel, may I suggest that you refrain from leading the witness. You are doing the testifying and she is saying "Yes", so you are getting (24) in on the record in precisely the language that you are very carefully choosing. Let the witness describe it, please.

MR. STEIN: Yes, Your Honor.

BY MR. STEIN:

Q. Can you briefly describe this study, this report, that you have before you?

A. I am afraid I don't know what you mean about describing it.

Q. Well, in terms of the light it casts upon the citizenship requirement before the Court today, the purpose of the requirement, the administration of it.

A. Well, the report describes the basis for the Public Assistance Law, 1939 Amendment, and these are the terms under which it is described:

"As war threatened the United States in 1939 many anti-alien bills were introduced in Congress and in State Legislatures. In our own Legislature Representative John E. VanAllsburg of Erie County introduced in 1939 an omnibus bill making a number of changes in the Public Assistance Laws. Some parts of this bill were defeated and some provisions have since been repealed, but the provision in regard to aliens still remains law."

(25) MR. STEIN: You may stop there at that moment.

I think it is clear that this report of the Department does direct itself to the issue of legislative intent and does give light to at least the surroundings and circumstances at which time this bill was passed, and precisely that is the growing fears about war, this hostility to aliens, the latter being a fact which Courts have taken into account as a basis for looking very carefully, scrutinizing very carefully the type of legislation before the Court today.

JUDGE WOOD: Assuming that is correct, basically isn't that a problem for the Legislature? If the Legislature doesn't think this is a proper Act, that it was passed, as you intimate, because of war hysteria, which I doubt existed in 1939, but in any event, isn't that a matter for the Legislature?

Why don't you get to the point of the constitutionality of the Act?

MR. STEIN: Well, the point about this being something for the Legislature I think is a relevant point because—

JUDGE KRAFT: Isn't this actually the writer's view? Somebody was hired to make some sort of a survey. In the course of making that survey he injects (26) in it the observation that in his view these acts were brought about by what you term war hysteria.

Have you looked into whether there is any legislative record on the subject at the time these amendments were enacted?

MR. STEIN: We did look into the legislative history, Your Honor, and it is quite bare. We did ask Miss Davis to bring with her records bearing upon the legislative history, but in terms of our research—

JUDGE KRAFT: If those records are barren, whatever impression the scrivener of this report got he didn't get from the legislative record.

MR. STEIN: Well, the legislative history for state legislation is particularly bare in terms of what is on the record for Federal legislation.

JUDGE KRAFT: I say so that if it was barren, the scrivener of this report to which you now advert didn't get his information from a legislative source.

MR. STEIN: Well, in terms of legislative sources, there weren't any committee reports, but

I am certain that in at least terms of his making this detailed analysis of what the circumstances were, he was aware of the opinions of various legislators, the climate of (27) opinion at that time, and in fact I think this Court can take notice of the fact that within five days of the passage of this law Pennsylvania passed the Alien Registration Law in the Hines v. Davidowitz case.

JUDGE ADAMS: I think we are now beginning to waste time. We have this report, and it has been marked, there has been an objection, and we will eventually rule on that objection.

MR. STEIN: Right. This is only going to the relevance of this.

BY MR. STEIN:

Q. Miss Davis, I think we can just end at this moment by just asking whether you have with you any other reports or documents speaking to this question of the statutory purpose and intent of this requirement.

A. No, I have no other documents as to the statutory purpose. I do have reports that indicate that for the last seven years the Department has recommended a change in the citizenship requirement, elimination of the citizenship requirement, to the Legislature.

Q. Have those recommendations been successful?

A. No, they have not.

Q. Can you tell us why they haven't been successful?

A. No, I can't tell you why.

MR. WORK: I object, Your Honor. I think it (28) requires a conclusion of the witness.

JUDGE ADAMS: We would sustain the objection, except the witness doesn't know the answer.

MR. WORK: Very well.

MR. STEIN: I think this really is directed to Judge Wood's point, Your Honor, about the legislative process being there to really deal with this type of problem. Because this is a very small minority—65 to 70 people a year are denied general assistance—I think it is really too much to expect a legislature to really direct itself to this problem.

JUDGE WOOD: Well, it isn't up to us to tell the Legislature what to do, so I think we should pass this and get to the constitutionality of the Act.

JUDGE KRAFT: And may I suggest, Counsel, that you refrain from interpolating your own views on the social aspects and why the Legislature does or doesn't act. You are not a witness, you are an advocate. We are here interested in what are the facts and what is the law to be applied to those facts, not in your social views spread on the record or your views as to why the Legislature does or does not fail to adopt some recommendation made by one of the departments of the State Government.

MR. STEIN: Well, I only direct myself to (29) that because Judge Wood has raised the

question about the legislative process being there to resolve this matter. The Hobson v. Hansen case, Judge Caleb Wright directs itself directly to this problem. This is precisely the point which Judge Wright makes, that when you deal with a politically voiceless minority the Courts must have an added responsibility to give scrutiny and to require states to justify these requirements with suspect criteria such as the one before the Court today.

BY MR. STEIN:

Q. Miss Davis, finally may I ask have you been and were you familiar with the Pennsylvania residency requirement in public assistance?

A. Yes.

Q. And can you briefly state what that requirement was?

A. That was a requirement that there be one year residence in Pennsylvania as an eligibility condition for all types of assistance.

JUDGE KRAFT: You had to live here as long to get relief before this decision as you did to bring a divorce action?

THE WITNESS: Yes.

(30) BY MR. STEIN:

Q. Now, would the citizenship provision be in any way similar to the rationale of the residency provision which you just described for us?

MR. WORK: Same objection, Your Honor, if he is asking the witness for the legal effect of it.

JUDGE ADAMS: I would sustain that objection.

JUDGE KRAFT: I join in sustaining it.

JUDGE WOOD: I do, too.

BY MR. STEIN:

Q. Would the effect of the citizenship requirement in terms of how it affects people, claimants for assistance in this State, be in any way similar to the effect of the residency requirement?

MR. WORK: Same objection, Your Honor.

JUDGE ADAMS: I think you can assume at this point that we have read the Shapiro case, all three judges, we understand that it was a bar and we understand that if a person is not a citizen, under general assistance there is a bar. You can't argue that. We want testimony, and this is the period for testimony. I think you are asking the witness for legal conclusions.

MR. STEIN: Well, our second witness can perhaps speak more directly to this being a bar and a (31) penalty upon people coming to the State.

I have no further questions.

JUDGE ADAMS: Do you have any questions?

MR. WORK: Just two, Your Honor.

Cross-Examination

BY MR. WORK:

Q. Miss Davis, is it a fact that the nonalien status applying to the Federal assistance categories is the subject of regulation in Pennsylvania?

A. Yes.

Q. Would you very briefly tell the Court why the regulation denies assistance to Federal categories and does not allow assistance to the general assistance category?

A. We misread the Federal regulations. We thought that they required that we abolish the citizenship requirement. This was back in '39 when the citizenship regulations came into effect.

Q. Prior to that time you also had a citizenship requirement for Federal assistance categories?

A. Yes.

MR. WORK: Thank you.

JUDGE ADAMS: Do you have any further questions?

(32) MR. WORK: No, Your Honor.

JUDGE ADAMS: I think you may step down.

MR. STEIN: As our last witness I would like to call Miss Maia Andre.

MAIA ANDRE, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. STEIN:

Q. Miss Andre, when you speak can you please address your answers to the Court and to me in a clear, loud voice, please.

Can you please state your name and address.

A. My name is Maia Andre. I live on 4010 Balwynne Park Road, Philadelphia.

Q. And can you describe your position and the agency with which you work?

A. I work for the Nationality Service Center and I am Director of Individual Services.

Q. What has been your prior work history and qualifications for your current position?

A. I have a Master's Degree in Social Work, and before I came to this agency four years ago I was working eight years in a family agency.

(33) Q. Now, Miss Andre, what contact have you and your agency had with aliens denied general assistance in Pennsylvania?

A. Well, our agency is set up to serve people who are foreign born, who are either new in this country or haven't acquired the language well enough to act or talk in their behalf. So it seems that whenever a foreign born person is in need, our agency is one of the agencies they turn to to help them.

Q. Now, about how many cases come to your attention every year of claimants denied general assistance?

A. Maybe about 10, 15.

Q. Can you describe generally this class of aliens who are subject to this general assistance requirement, very briefly?

A. Most of them seem to be just below 65. They are not young enough any more to work, or to work consistently, and they are not old enough to be eligible for assistance if they are not citizens, so their health is starting to break down, I would say most of this category, or they are sick, temporarily sick.

Q. Can you estimate about how long generally these aliens have been in the country?

A. Most of them came as displaced persons, or at least (34) after World War II.

Q. And can you explain to us why they aren't citizens today?

A. Well, this is one of the questions we ask for our records, and usually they have been afraid that they may not be able to pass the citizenship test because they don't speak enough English to give answers to the history test.

Q. Do you have documentation with you today of representative cases of claimants who have been denied general assistance as a result of their lack of citizenship?

A. We keep records on every case, and I summarized a few of them.

Q. Are these records that you have today from records made in the normal course of business of your agency, and was it in the normal course of your business of your agency to make these records?

A. Yes.

Q. May I see them?

A. I have four.

MR. STEIN: I would like to have marked and offer as Plaintiff's Exhibit No. 2 these case summaries from Nationality Service Center.

JUDGE KRAFT: Are these original records or did I hear her say these are summaries she made of (35) the original records?

MR. STEIN: These are summaries, Your Honor. The records apparently are—well, let me ask Miss Andre.

BY MR. STEIN:

Q. Can you describe these records in terms of their length or other characteristics in your office?

A. The records are written by the social workers who see the people, and they vary in length and they vary in the way they are written up. There is certain information that we require them to have, but they are either too lengthy or not really good enough to present in this court.

JUDGE WOOD: What is your offer of proof? What are you trying to prove, irreparable harm?

MR. STEIN: Irreparable harm is one point, Your Honor. The second is the travel aspect, as I believe in a number of these cases residents have been forced to leave the state as a result of the citizenship requirement, and that is a fact in some contention, apparently.

I would like then to offer these again.

JUDGE KRAFT: Then you are not seeking to prove that their right to travel was chilled?

MR. STEIN: Well, I hesitate in using the term "chilled". I perhaps might say there was a

penalty (36) involved, or at least the fact that they were forced out of the state as a result of this requirement.

MR. WORK: If I understood the foundation which Mr. Stein laid correctly, Your Honors, the record purported to be hearsay based upon hearsay.

MR. STEIN: Your Honor, these are business records. Obviously Miss Andre could not bring down the lengthy records which she does have in her office.

JUDGE KRAFT: Counsel, I don't accept your statement that obviously she could not bring them down. You are managing this like a witness, not a lawyer. She said there are original records from which she made these summaries. Now, I gather that these summaries were prepared for use in this court, is that right?

THE WITNESS: Well, there were summaries. I think I rewrote them and they are more clear than those summaries are.

MR. STEIN: Miss Andre did prepare these, and these are accurate, as she said. They represent summaries of long case records.

JUDGE KRAFT: That is not what your adversary is pointing to.

MR. STEIN: Well, I think in terms of the (37) business records exceptions to the hearsay rule, Courts have been flexible to allow—

JUDGE KRAFT: What exception is there to the failure to produce the original records where they are in existence and available?

MR. STEIN: Only because those records are of some length, Your Honor. Miss Andre can produce them, if that is required, but at least in the past it has not been a necessity to bring these lengthy records down with her.

MR. WORK: Your Honor, with all due respect to the Court, and certainly being as willing as anyone to save the Court's time, as I have previously in this same case stipulated, we recognize that if you are in this position and you do not have an income, there is undue hardship.

JUDGE WOOD: I don't know what more you want.

JUDGE ADAMS: What more can you get?

JUDGE WOOD: They have agreed to that from the beginning.

MR. STEIN: We would be willing to stipulate, if counsel for the Commonwealth would stipulate, to the accuracy of the facts of these records, of the (38) summaries, and it may not be necessary—

JUDGE KRAFT: I don't think he is willing to stipulate to the accuracy of facts when he knows nothing about them. He said he is perfectly willing to stipulate that persons who have no other source of income who are deprived are necessarily in want, and I have no doubt he would be perfectly willing to stipulate, if you

asked him, that the normal human reaction in that condition is just like the animals who move with the seasons, that when the fodder is gone they move to an area where the fodder is available.

MR. STEIN: Well, we then would be prepared to enter into that type of stipulation. I think it might be of value, though, to have the concrete factual situations of individuals who have come into the State for better job opportunities and then have left the State to go to New Jersey or to New York as a result of this requirement. We would be happy to make available to Mr. Work the original records, these case summaries, and then enter into a stipulation about the concrete facts of these records.

MR. ADAMS: I think the three judges here are prepared to sustain the objection. If you want to work out something with Mr. Work on the specific case (39) histories, and you want to stipulate it, of course we will receive any stipulation.

I would suggest that you follow Judge Kraft's suggestion, particularly in view of Mr. Work's previous objection, that he is willing to say when these folks apply for public assistance, general assistance, and are denied that because of the citizenship requirement that Miss Davis was talking about, that they are in want and in need. He is conceding that.

Now, you might ask him if he is also willing to concede that frequently they then leave

Pennsylvania to go into another state to satisfy this need. If you had those two things, I must say I can't see offhand how you can get very much more out of the testimony.

MR. STEIN: Right.

JUDGE ADAMS: That is up to you two. We can't stipulate for counsel.

MR. STEIN: Right. We are prepared to enter into negotiations to a stipulation to that effect, and that would preclude the necessity of Miss Andre testifying to these cases today.

JUDGE ADAMS: Well, she has testified. Do you wish to examine on anything she has testified to, (40) Mr. Work?

MR. WORK: No, Your Honor, I do not.

MR. STEIN: That will be all, Miss Andre. Thank you.

JUDGE ADAMS: Thank you very much.

MR. STEIN: Your Honor, we do have before the Court today a renewal of our application for a temporary restraining order for Mrs. Beryl Jervis.

JUDGE ADAMS: Why don't we hold that up until we complete this testimony and the stipulation.

Are there any other witnesses that you wish to present?

MR. STEIN: We have no further witnesses.

JUDGE ADAMS: You have no witnesses, Mr. Work?

MR. WORK: We have no witnesses, Your Honor.

JUDGE ADAMS: So we are going to close the record as far as testimony is concerned, except for any stipulation that the two of you can agree to along the lines that Judge Kraft indicated.

MR. STEIN: Yes, Your Honor.

JUDGE ADAMS: Is that understood? Is there any objection to that?

MR. WORK: No, Your Honor.

(41) (Discussion off the record.)

JUDGE ADAMS: All of us feel that you might as well proceed with the argument on the entire matter. We have read the documents that you have prepared. We have read the documents that the Commonwealth has filed. We have a pretty good understanding of what is in them and it probably would expedite the entire matter for you to present full argument, and we assume that you are prepared to do that because you were requested to do that. Is that agreeable?

MR. WORK: We are prepared, Your Honor.

JUDGE ADAMS: Is that all right with you, Mr. Stein?

MR. STEIN: Yes, Your Honor.

JUDGE ADAMS: Why don't you just proceed.

MR. STEIN: The claims which plaintiffs put before the Court are three in number. The first is directed, as we have noted earlier, to this right of interstate travel of aliens in this country.

The right of travel itself was spoken to in Shapiro v. Thompson and in United States v. Guest, as being a right which is basic to this Federal Union, although not explicitly mentioned in the Constitution.

It in addition holds forth in cases involving (42) regulation of immigation, State regulation of immigration, Truax v. Raich, which holds that aliens have a right to enter into and abide in states, and in fact, Truax v. Raich is cited by Justice Potter Stewart in the Shapiro v. Thompson concurring opinion, with U. S. v. Guest, as a source of the right to travel in this country. So there are then two bases for the right to travel.

The fact that this citizenship requirement deters aliens coming into this State and in a sense penalizes them when they do come here, forcing them to leave the State, I think is clear beyond a doubt. The Supreme Court in fact inferred from a one-year residency bar that there is a deterrence to people coming in and that there is a penalty or chilling effect, is the term that was used there, upon their exercising this right to interstate travel and coming into states, including Pennsylvania.

In fact, I think a fortiori in this case you have something even worse than a one-year residency requirement. You have a complete bar to aliens wishing to enter into this Commonwealth, and the aspect of the right to travel goes not only on the merits of that point, that there is an abridgement of a liberty which is extended to aliens, but it also goes to requiring a (43) compelling state interest test to be applied in this particular case.

I might add that the Commonwealth has claimed that the right to travel only applies to citizens of this country. It is true that in cases like United States v. Guest, or a few of these other cases, that citizens were the parties coming before the Court, although I might add Truax v. Raich included aliens and was solely aliens, but the Due Process Clause has been viewed as one source of the right to travel, and it is clear on the face of the Due Process Clause that that reads:

"No person shall be denied liberty," and Courts begining with Yick Wo v. Hopkins have held that both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment are applicable to aliens.

On the second claim, the Equal Protection Claim, I think one should begin that analysis by looking at the case law, which requires a particular scrutiny of this requirement by the Court. The Takahashi v. Fish & Game Commission established that, as did other case law.

Alienage is a very suspect criteria just like race. It has been equated to race in a number (44) of Supreme Court decisions, and because that is so the Courts have really set a very high threshold of justification upon states to justify this requirement.

In addition, case law substantiates that when you are dealing with a politically voiceless minority, a concrete or insular minority, similarly a Court must give very careful scrutiny to this type of requirement.

On the merits of the equal protection claim, Shapiro v. Thompson is we believe very strong authority for holding that states cannot establish these two classes of claimants for public assistance. Shapiro v. Thompson went through a whole range of state interest, matching it against the compelling state interest test, and voided each of them.

The only state interest which the Commonwealth offers is precisely that the Commonwealth has a right to save money, not to expend that small sum of money for those 65 or 70 claimants.

JUDGE KRAFT: Does the smallness make any difference in your view?

MR. STEIN: Not really.

JUDGE KRAFT: It seems to me you are trying to argue a constitutional point on one side and (45) then say, "Oh, it ought to be thrown out because it wouldn't cost the State much money anyway."

MR. STEIN: Well, we only raise it in terms of its going to the request for injunctive relief in terms of diminimus harm to the State.

In fact, to compare the cost and the numbers to the residency requirement, it is perhaps 1/10 the number of people, and 1/10 the cost involved here, as in the residency case. But you are right in terms of the constitutional claim. I don't think that amount, of course, is particularly significant.

The Supreme Court in Shapiro did say very clearly that the saving of welfare costs cannot be a valid, independent basis for an invidious discrimination, and in fact that is the only basis offered to us by the State in this case today.

JUDGE ADAMS: I don't think that is a correct summary of Mr. Work's briefs. As I understand Mr. Work's brief he looks at the Purpose Clause in the Act and he interprets that because of the specific language as showing a purpose on behalf of the Commonwealth to assist citizens as distiguished from noncitizens, and he says that this is a valid purpose, and that is the basis for the distinction. I didn't think (46) he was saying anything about saving money.

MR. STEIN: Well, I mean, I think in terms of directing a state interest just to citizens—

JUDGE KRAFT: Suppose Pennsylvania had been immediately adjacent to Cuba when the Castro problems arose and Pennsylvania had in the eastern portion of its borders the same

influx of aliens that Florida has had and that the Federal Government declined to afford any aid of any kind and said that these aliens are being admitted, they have the right to travel, they have settled in the nearest state, which is Pennsylvania, and Pennsylvania is without right to deny them public assistance? The mere fact that there may be a few now—Florida a few years ago no doubt had a great impression that there wouldn't be the overwhelming influx of Cuban refugees that there was—so the fact that it is at the moment so doesn't mean that it will hereafter forever be that way.

Suppose the North Irish and the other Irish get more embattled than they currently are and one group suddenly decides to immigrate to we will say the Scranton-Wilkes-Barre area in Pennsylvania, which has quite a heritage of Irish forebears?

MR. STEIN: Right, but I think when that happens, Your Honor, when you have the enormous influx—(47) and I think the Cuban example is a good one—in those cases one finds a national response to the problem.

JUDGE KRAFT: Suppose one doesn't find the national response? You can't count on the national response as a thing certain. Suppose Congress is beset with so many other problems it says, "We simply can't do anything about it" and the state into which they move after they get here, whether they arrive directly from we will say Cuba or whether they land at Cape May and

come across New Jersey into Pennsylvania, it could be great numbers. The political changes in other nations in the world historically have begotten migrations into this country, and historically, at least in my view, a large part of the migrations thus begotten have had tendencies to gravitate to particular areas, which is humanly understandable.

MR. STEIN: Right, but our only real answer to that—and in fact that involves the preemption argument about the national Government's role, and they have a very substantial role in this area—is that at least as to the only examples we can think of—and I think the Cuban example is precisely that—the Federal Government in the Cuban example did make provision for substantial amounts of public assistance; no (48) state money, 100 percent of Federal money. I am fairly certain if history teaches us anything that the Federal Government faced with that problem does react, if not in the Cuban way of providing the Federal money, then in fact barring aliens from coming into this country.

JUDGE KRAFT: Suppose we should decide this case in your favor and the State should then enact legislation repealing entirely this form of welfare in the State. I am sure that would have some effect on the inclination of people to travel. Do you think it would be unconstitutional then for the State to abolish entirely this what I will call Form 5 of the General Welfare Plan?

MR. STEIN: No, it would not be unconstitutional. There is no constitutional duty to provide welfare, but there is a constitutional duty that when welfare is provided it be provided on a nondiscriminatory basis, and that really is the issue before the Court today, the fact that there is assistance provided but it is provided on a discriminatory basis.

I might add that the Supreme Court opinion of just a week ago, Goldberg v. Kelly, did at least view public assistance as not being mere charity. In fact, they quoted the Preamble to the U. S. Constitution that it (49) is part of our purpose of providing the general welfare and to secure the blessings of liberty to all people within the borders of the United States. So that although it is not a constitutional right, these courts, the Supreme Court and the lower district courts, have viewed it as of extreme importance, and perhaps of the same importance as constitutional values in this country.

To summarize, then, on the equal protection argument, the standard which is applicable is the compelling state interest standard of Shapiro v. Thompson, because of two reasons: One, there is a right to travel involved here, although perhaps the Court does not have to rule totally on whether there is an abridgement here. There is that interest here, that right which comes into play in this case; and secondly, there is the very subsistence of claimants at stake.

The Supreme Court's opinion in Shapiro can be viewed as really two-hinged, as two bases

to the compelling state interest doctrine: One, fundamental constitutional right of right to travel, and the other the fundamental interest of providing subsistence income to someone who will have no other source of living, and the Court did mention that one's very food, clothing and shelter is at stake, and that is part of the Court's (50) holding that a compelling State interest is required in this case.

As we said before, just providing for one's citizens does not appear to meet that standard of compelling state interest.

The Courts in the preemption area—and I might add cases like Takahashi really go off on both equal protection and preemption grounds, that states like Pennsylvania cannot not only interfere with Federal regulations in this area but cannot enter into the area of regulation of aliens.

The fact that there is interference is very clear. The Immigration and Naturalization Law states that it does bar paupers into the country and does say that people who are likely to become a public charge within five years who cannot affirmatively show that their condition preceded their entry into the country, that is, that the need for assistance did not arrive after their entry into the country, those people are subjected to deportation from this country.

Now, the State citizenship requirement cuts enormously broadly. It bars aliens irrespective of their length of stay in this country, irrespective of when their need for assistance arose in this

country, and (51) on those two points alone this goes contrary to Federal law.

In addition, there are requirements, there are provisions in the Civil Rights Act of 1964 and in 42 U. S. C. 1981 which extend privileges to aliens. They are really results of the Fourteenth Amendment's equal protection, which extends an equality of privileges to all, including aliens.

The Commonwealth I think on this preemption argument has relied very heavily on somewhat old case law resting upon the so-called proprietary interest rationale, People v. Crane, the leading case there, and this proprietary interest or special public interest doctrine has been largely repudiated. Takahashi v. Fish & Game Commission I think sounded the death knell, in the words of the California Supreme Court this past year in Purdy, to that doctrine.

JUDGE KRAFT: What would you say if a law enacted by a state, we will say anent, one, fishing and two, hunting, that imposed a $5 fee for resident fishing licenses and resident hunting licenses each, $25 for nonresident fishing licenses and nonresident hunting licenses, and provided that licenses may not be issued to aliens and provided that no hunting or fishing could (52) be done within the borders of the state on state-owned lands without a license?

MR. STEIN: The clearest invalidity of that is the prohibition against aliens, but since it does involve an area of conservation and wild

life, that happens to be one of the few narrowly carved exceptions which the special public interest doctrine represents.

JUDGE KRAFT: Well, is the wild life regarded as the property of the state?

MR. STEIN: Well, some Courts have viewed it as such, and these are decisions going back quite a bit. There hasn't been very much recent case law. The most recent case law, of course, is Takahashi v. Fish & Game Commission.

JUDGE KRAFT: Yes, but Takahashi was offshore fishing. That wasn't within the boundaries, the clearly undisputed boundaries of the state.

MR. STEIN: Well, they also included a claim to the three-mile limit off California, but granted that the aspect of that being a property of the state is not as clear cut there because it was fish outside the borders of the state, but I think even if that is a valid doctrine today—and Takahashi suggested it is not—(53) I think it is a very narrowly carved one which is not applicable to this case.

If one analyzes the People v. Crane case, which has a similar proprietary interest rationale, that really goes off on grounds of the fact that public employment or employment on public works is a privilege, and as Justice Cardoza said over half a century ago, privileges can be denied to aliens.

JUDGE KRAFT: Don't say that was sustained. Most of us on the bench here were born more than half a century ago, and we don't feel, as bright as young people like you are, that you know it all yet.

MR. STEIN: Well, I surely didn't mean to imply that, Your Honor. I only meant to imply that recent case law, Sherbert v. Verner and the Goldberg v. Kelly case decided last week really sounds the demise of this distinction between privileges and rights, and that one cannot by just calling something a privilege somehow erect that as a separate category of things which can be denied to aliens but granted to citizens. That really is the rationale of People v. Crane.

In addition, People v. Crane mentioned that aliens don't pay taxes, and that was another aspect to the case, and it is clear at least in our named (54) plaintiffs they have been employed, they have paid taxes to Pennsylvania, as have other aliens in the class.

I just might add in concluding this point on the preemption ground that the Purdy & Fitzpatrick v. California case is really the most recent case, a 1969 case of the California Supreme Court, and that gives a very detailed review of the prior case law, and I think that plus Takahashi is the authority which substantiates our point that this is a violation of the preemption doctrine.

JUDGE ADAMS: Purdy doesn't mention Crane.

MR. STEIN: I am not certain whether it cites Crane in particular. It does I believe cite two related cases of proprietary interest.

I am just refreshing my memory. We did deal with this case at page 19 of our brief. Yes, it does say:

"May the State simply favor its own citizens in the disbursement of public funds?"

This is really the basis I think of the Commonwealth's claim of preferring one's own citizens.

It goes on to say that aliens support the State of California with their tax dollars, and they (55) continue about the stake which an alien has, and then:

"Finally, any classification which treats all aliens as undeserving and all United States citizens as deserving rests upon a very questionable basis . . ."

JUDGE KRAFT: Wasn't that the state which rounded up all the American born nisei?

MR. STEIN: That is true, Your Honor, during the war.

JUDGE KRAFT: Things have changed in that State.

MR. STEIN: Right; that they have, fortunately. And in fact, if one looks to those times and one looks to the period of 1939, one sees that the Pennsylvania Legislature in addition to passing this law was passing its Alien Registra-

tion Act, and it is that Act which passed within five days of the citizenship requirement which arose in Hines v. Davidowitz, and that case went up to the Supreme Court and there was very strong language there that where there is a full scheme of regulation in an area like naturalization and immigration, a state cannot interfere with, complement, set any additional requirements, really just cannot at all regulate in that area, and I think that is very strong (56) authority for striking down a citizenship requirement.

JUDGE KRAFT: Might that not be a good ground for a basis of distinction on the part of the State in saying that, "Since we have no voice in the admission, and since that is a matter solely within the control of the Federal Government, we will provide welfare generally for our own citizens only and let the Government that has preempted the field make the provisions for those whom they admitted in exercise of their preemptive rights"?

MR. STEIN: I don't think it is totally accurate to say that Pennsylvania has no voice in this area. In our constitutional system Pennsylvania has representation in the Senate and the Congress to make its voice heard as to the regulation of aliens, and I think that presents at least Pennsylvania with a basis for getting its say or having its problems heard in a national forum. But we do maintain, though, that the Congress has set very clear requirements about admission

of poor people into the country and as to whether they can in fact stay in this country, and because they have done so, at least Pennsylvania as one state is forbidden from setting any of the requirements that they have, particularly the citizenship requirement that is before the Court in this area.

(57) That concludes our argument. I just might make one very brief reference to Mrs. Jervis. We did seek a temporary restraining order some time ago which was denied without prejudice. We do at this point wish to renew that application, and particularly in light of the fact that Mrs. Jervis did apply for assistance at the end of February, some four or five weeks ago, and she has been served with a notice of distraint from a constable for failure to pay rent. We think—

JUDGE KRAFT: How long has she been here from Panama? I have forgotten.

MR. STEIN: Mrs. Jervis I believe has been here close to two years.

JUDGE KRAFT: How old is she?

MR. STEIN: She is 57 years old.

JUDGE ADAMS: Mr. Work, do you wish to address yourself to the Mrs. Jervis application at all?

MR. WORK: Only, Your Honor, that I would renew my objection to the granting of a temporary restraining order for the same reason that I voiced objection to it before.

I think, first of all, that assuming every case of undue hardship that presents itself to the Court, regardless of the nature of the case, is a ground for a (58) temporary restraining order is somewhat a unique situation. Secondly, the granting of a temporary restraining order in such a case has the effect of the Court granting a mandatory injunction to the State to violate a present presumptive constitutional State statute. I think for those reasons, Your Honor, we oppose it.

JUDGE WOOD: We do have the unfortunate situation, though, where I did grant one as to Mrs. Leger and then I stopped issuing them every week or so. We have one outstanding.

JUDGE KRAFT: Of course we can always please the plaintiff by vacating that until we make a decision on the entire matter, can we not?

MR. STEIN: That is an option. We would question that, obviously.

I do want to point out that this notice of distraint is a new fact going to irreparable harm which was not before Judge Wood.

JUDGE WOOD: Oh, now don't say it wasn't before me. Mr. Work is indicating he agrees. Why, irreparable harm is clearly indicated.

MR. STEIN: And going to the standard of issuing a temporary restraining order.

JUDGE WOOD: That wasn't the point. The point was you started this action over three months ago. (59) You were in an awful hurry then. Then a week later or two weeks later, perhaps a month later, you added another defendant. Then you proceeded to make a class action of it. I just didn't know when we would stop with the restraining orders.

MR. STEIN: Right. Our only reason for requesting the restraining order today—and we are aware that at least preliminary and permanent injunctive relief could and obviously would provide relief for Mrs. Jervis—there is at least irreparable harm which is before the Court today in terms of her available resources of food, clothing and shelter, and the latest being this notice of distraint. The standard, of course, for a temporary restraining order is merely, one, a claim which is not capricious or wholly unreasonable and Judge Joseph Lord in the Residency Case, Smith v. Reynolds, issued restraining orders for the named plaintiffs there and for the added plaintiff, and that had the same effect of the mandatory effect of providing assistance, as did Judge Davis in Williford v. Laupheimer in this District, and Judge Caleb Wright sitting by designation in Cooper v. Laupheimer, and that was a class temporary restraining order, the latter.

(Discussion off the record.)

(60) (Recess, 11:20 o'clock a.m.)

MR. WORK: May it please the Court. Your Honors, I would like to say briefly that

this case in my opinion represents another in a long line of cases in which we have found or recognize a social wrong, where plaintiffs say, "Well, since you haven't responded to the social wrong, clearly your failure to respond must be unconstitutional in one sense or another."

I recognize certainly as fully as anyone that there are social ills. My heart is as big as anyone's to those ills. However, Your Honors, I submit that I don't believe that in every case where we find a social ill we can immediately look to the State and say, "You have to rectify this situation", because I don't believe that the Constitution requires that, and I certainly don't believe that morality requires it either.

The Fourteenth Amendment, as we have conceded in our brief, certainly applies to aliens. We don't deny that. However, we submit to Your Honors that the cases which have been cited in plaintiff's brief as well as in defendant's very clearly indicate that the State may distinguish between citizens and aliens (61) if the distinction bears some reasonable relationship to a legitimate state objective, and for the State's objective, Your Honor, we submit the only place that we can turn is the statute itself, and I beg the Court's indulgence to read very briefly the Preamble to the statute which I have set forth in my brief, which I think sets forth the State's objective:

"It is hereby declared to be the legislative intent to promote the welfare and happiness of all the people of the Commonwealth, by provid-

ing public assistance to all its needy and distressed; that assistance shall be administered promptly and humanely with due regard for the preservation of family life and without discrimination on account of race, religion or political affiliation; and that assistance shall be administered in such a way and manner as to encourage self respect, self dependency and the desire to be a good citizen and useful to society."

Therefore, Your Honor, we state the purpose read in its entirety is to promote the welfare of citizens of the Commonwealth.

JUDGE ADAMS: Do you have page 4 of your brief in front of you?

(62) MR. WORK: Yes, Your Honor.

JUDGE ADAMS: You have read this rather quickly, but just to make my point:

"It is hereby declared to be the legislative intent to promote the welfare and happiness of all the people of the Commonwealth, by providing public assistance to all its needy and distressed . . ."

MR. WORK: That is right, Your Honor.

JUDGE ADAMS: It doesn't say "all its needy and distressed citizens," it says "to all its needy and distressed." When it uses the word "citizens" it is down near the end of the section you read, and it says ". . . and the desire to be a good citizen . . ."

MR.WORK: That is right, Your Honor.

JUDGE ADAMS: It doesn't say "for good citizens".

MR. WORK: No, it doesn't say "for good citizens," Your Honor, but we submitted in our brief, and my only answer to the Court's argument is that the Preamble has to be read in its entirety, in that the reference to the word "people", we are referring to citizens as shown by the concluding clause of the paragraph.

That, however, doesn't answer the question (63) before the Court, because the question then becomes if we even assume for the sake of argument that that is the State's objective, the question then becomes whether or not that objective is legitimate, and that of course brings us to the cases which plaintiffs have cited and which we have also cited, dealing with the supremacy clause, and those cases, of course I submit, Your Honors, there is a clear distinction between those cases and the case presently before this Court, and I include in those cases the most recently decided case by the California Supreme Court.

I submit to Your Honors that those cases all involved a very fundamental right, and that was the right to earn a livelihood, and, Your Honors, I am sufficiently naive to feel that there is still a part of that great American ideal left that we can draw a distinction between the right to earn a livelihood and the right to receive public assistance, notwithstanding the language of the Supreme Court in the Goldberg v. Kelly case, which referred to a statutory right of entitlement.

I would point out that as I read the opinion in Goldberg v. Kelly, Your Honors, the Court has not even in that case said that the right to receive public welfare is a constitutional right. In fact, as (64) Your Honors will recall from the opinion, the Court specifically avoided that specific question by saying it was a right of statutory entitlement.

JUDGE ADAMS: Well, it does say this:

"The constitutional challenge cannot be answered by an argument that public assistance benefits are a privilege and not a right."

That is from the majority opinion by Mr. Justice Brennan.

MR. WORK: That is correct, Your Honor, but I believe Your Honor will note in the body of the opinion the Court later at least clarified that situation to say it is a statutory right of entitlement by stating that the Federal Government and the states had seen fit to grant this right and therefore would have to do so in accordance with the terms of due process.

JUDGE ADAMS: But isn't Mr. Justice Brennan suggesting along the lines hinted at by Judge Kraft before? You may not have to grant public assistance, and if you don't pass a Public Assistance Act that is not unconstitutional, the failure to pass the Act, but once you pass the Act, the Act must be made available to all persons under the Equal Protection Clause, which does not go off on citizenship. Isn't that the question (65) in the case?

MR. WORK: I think it is, Your Honor, and I think the cases which we have referred to, the Truax v. Raich, the Takahashi case, all of those cases, the Crane case in New York, refer to that right but then go one step further and develop the special public interest doctrine which says the state in its administration of its public funds may constitutionally restrict the use of those funds to citizens.

By the way, Your Honors, in saying that the Takahashi case overruled or laid to rest the case of People v. Crane, I would call the Court's attention to the fact that the People v. Crane case was not only affirmed by the Supreme Court in 239 U. S. 195, but as late as 1961 was cited as authority in the Cafeteria and Restaurant Worker's Union v. McElroy, 367 U. S. 886.

JUDGE ADAMS: Was it cited as authority?

MR. WORK: Well, I think I have used the wrong word when I said it was authority, Your Honor. At least as of that moment the Supreme Court was not saying that the case was laid to rest, and this was a great deal subsequent to both the Takahashi and the Truax cases.

JUDGE ADAMS: 1961.

MR. WORK: Now, the question, of course, (66) becomes again under the Supremacy Clause whether or not the Federal Government has expressly preempted this field. To that I would say several things, Your Honor, the first of which is that the Pennsylvania statute dealing with the granting of public assistance does

not attempt in any way to regulate aliens. It is regulating the public funds administered on behalf of the Commonwealth and establishing an eligibility for those funds.

The eligibility indirectly, of course, would have the effect of denying to aliens the right to public assistance. However, I submit, Your Honor, that in addition to not attempting to regulate aliens, such a purpose is entirely consistent with the Federal statutes on the subject, and I call the Court's attention to those sections of the statute which have been cited in both briefs with respect to 1182(a)(7) of Title 8, 1182(8), 1182(15), 1183 and 1251, the basic reasoning of which is that a person may not be admitted to the country if he is indigent. In some cases if he shows any indication of becoming indigent he may be required to post a bond. If he becomes indigent within five years after admission to this country for causes which, with the burden being on the alien to show, did not occur prior to his entry, he may be deported.

(67) At this point I should like to point out to the Court that both of the named plaintiffs before this Court at the present time are technically I believe subject to the provisions of that deportation statute. While the stipulation of facts which counsel has said indicates that these causes arose after the entry of the individual, I would submit that such a stipulation of facts would not be binding on the Federal authorities. Therefore, while I do not raise it for any part of

the Court's decision in this case, I merely point it out to show that even where plaintiffs have become indigent and seek the redress through the Federal Court, that it may well be that the Federal purpose is not to be thwarted thereby, because the Attorney General still in both cases here would have the right to commence such deportation proceedings, which brings us to the so-called right to travel.

First of all, I again point out to the Court that the conditions upon the entry of an alien into this country, that is, requiring that he not be indigent, should therefore indicate that the State's laws with respect to indigency would have no effect on the determination of that alien to settle in one state or another.

(68) Secondly, the right of the alien to travel freely throughout the United States I submit to Your Honors has not been established by the Shapiro case or any of the other cases cited in that field. Those cases all specifically and very specifically state "citizens". However, even if we admit for the purposes of argument that the right to travel is extended to aliens under the Due Process Clause, we submit, Your Honor, that the public assistance policy of this Commonwealth with respect only to general assistance categories does not interfere with that right, and in fact as Judge Kraft so aptly noted, perhaps it would stimulate it in some instances.

Also, Your Honors, I think that there are several important things to note, and that is with

regard to Pennsylvania's other statutes affecting this general area, the statutes have clearly expressed an intention not to discriminate among aliens.

I call the Court's attention to the section of the Public Human Relations Act which is set forth in our brief with respect to employment, housing accommodations, any of those matters which have been found to be matters of right under the Constitution. We clearly set forth it is our intention not to limit those to citizens of Pennsylvania, and only in the very general area of (69) public welfare have we taken to draw a distinction, and the purpose I submit to Your Honors is not to save money in that sense but to conserve the assets of the Commonwealth of Pennsylvania for the people of Pennsylvania, the citizens of Pennsylvania, which is clearly expressed in the statute.

Finally, I think that with respect to the Takahashi case, which, by the way, both it and Truax expressly recognized the People v. Crane case in the decisions and distinguished the right to earn a livelihood from the right to receive public charity, the Takahashi case, as the Court very appropriately noted, involved a much more invidious discrimination than between aliens and citizens, and that is that it discriminated even between aliens, applying only to those of Japanese ancestry.

With respect to the situation which Judge Kraft noted, I think that the two situations are

very analogous because we have had instances of a distinction being used in the area of fish and game and other natural objects of bounty within the Commonwealth which are not said necessarily to be objects of proprietary interest, but that the Commonwealth as trustee of those rights has the right to delve them out among its (70) citizens as it sees fit, and as Your Honors are aware, and I am sure Judge Kraft was aware when he asked his questions, we do in our statutes draw a distinction with respect to fishing privileges and hunting privileges, all areas of that nature, with respect to aliens and citizens of the Commonwealth.

JUDGE KRAFT: Do you know whether there is any such provision in the statute which licenses persons to carry firearms? Are you familiar with the statute? Do you know offhand whether or not there is a provision in that statute which limits the right to apply for such a license to citizens?

MR. WORK: You are referring now to the Uniform Firearms Act?

JUDGE KRAFT: Yes.

MR. WORK: Yes, Your Honor, there is a provision in that statute which restricts the right of aliens from carrying firearms.

The Court has also noted some very important distinctions with respect to what we consider rights which are not afforded to aliens, the right to hold public office, the right to vote, any

number of areas in which with respect to citizens the Courts have long since held they are rights, but nevertheless have as of (71) this time not said that they had to be afforded to aliens.

So that I think, Your Honors, that under the special public interest doctrine the state is clearly within its rights in the general assistance categories of limiting those objects of its bounty to citizens.

With respect also to those same areas, we have the plaintiff saying, "But nevertheless these individuals pay taxes", and of course I think that also applies equally to the areas of which I have just mentioned. They also pay taxes, income taxes and otherwise, in the same areas. However, they are still denied certain privileges whether or not they are taxpayers.

I think the tax area is also important from the standpoint of saying that this perhaps restricts people from coming into Pennsylvania when they are talking about the noncitizenship eligibility. I think this might also be said of Pennsylvania's tax structure. This perhaps would deter certain aliens from settling in the Commonwealth. If plaintiffs' theory were valid, we would then say that those taxes are not constitutional because they infringe upon the right of people to come into the Commonwealth. We submit, Your (72) Honors, that the Supreme Court has certainly not said that to date. Thank you.

JUDGE KRAFT: Counsel, we have concluded that we would like the Commonwealth's counsel—and if it can be stipulated by plaintiffs' counsel we would welcome it—to list in a supplemental brief or memorandum all legislation in Pennsylvania which makes distinctions between citizens and aliens respecting the enjoyment or the omission of the enjoyment of anything, and I would like them listed very briefly categorically with a reference to the statute, and then if either counsel wants to supplement what they have said in their present briefs, by making a further written argument as to analogy or want of analogy, counsel are invited so to do.

MR. WORK: Does Your Honor want those in chronological order as well as—

JUDGE KRAFT: I don't care. I would say I would prefer them in category form. In other words, by way of illustration, right to hold office, right to vote, right to be licensed to hunt, right to be licensed to fish, right to be licensed to carry firearms, and whatever other things the Legislature has in this State acted upon.

JUDGE ADAMS: I thought we would get to (73) the question of time. You are probably down from Harrisburg right now, aren't you, Mr. Work?

MR. WORK: Yes, Your Honor.

JUDGE ADAMS: Would this be a good time for you and Mr. Stein to try to get together on the stipulation, or is that inconvenient for you?

MR. WORK: Fine, Your Honor.

JUDGE ADAMS: We don't want to impose, we just want to do something that is reasonable. Perhaps you could get the first stipulation which dealt with the testimony in what, in the next few days? Is that reasonable?

MR. WORK: Yes.

JUDGE ADAMS: I would guess that the material that Judge Kraft is referring to will take you a week, but we would rather hear from you as to an estimate.

MR. WORK: We would like the Court to give us a week, Your Honor. Within that time we will also try to—

JUDGE KRAFT: We want to expedite it, but we don't unreasonably want to hamper either side in that research. Tell us your own view as to what you would regard as a reasonable time to compile that and (74) get it in written form to transmit it to the Court. Then we will hear what your adversary has to say.

MR. WORK: I would say certainly 10 days would be a maximum time, Your Honor, and we would try to shorten that by a great deal.

JUDGE KRAFT: Mr. Stein?

MR. STEIN: I would agree exactly with that.

JUDGE KRAFT: All right, because I see no reason why you cannot move on it simultaneously.

MR. STEIN: Right, and I think we can.

JUDGE KRAFT: Very good. Thank you.

JUDGE ADAMS: Why don't we have the stipulation before the end of the week. Why don't we have that filed before the end of the week, but we would suggest that you try to dispose of it while you are both here, and we will have the statutory material that Judge Kraft has referred to within the ten days that you have suggested.

Is there any objection to that?

MR. STEIN: No. If the Court please, we would like to make rebuttal argument. We could make the rebuttal in our supplementary memorandum of law if the Court sees fit.

JUDGE ADAMS: Would you, please?

MR. STEIN: Yes.

(75) And, finally, we do have our motion for a restraining order for Mrs. Jervis still outstanding and we would like to know whether the Court wishes—

JUDGE ADAMS: We have agreed that this would be a combined temporary and final injunction proceeding. There is no objection to that. We will dispose of those together, but you are pressing us now on the temporary restraining order?

MR. STEIN: Yes, particularly because of the specific harm for Mrs. Jervis.

JUDGE ADAMS: They are the only two things outstanding, plus the objection that you made, Mr. Work, regarding some of the testimony.

MR. WORK: Yes, Your Honor.

JUDGE ADAMS: What is the pressing nature of this document you have referred to before?

MR. STEIN: Well, Mrs. Jervis received a notice of distraint that the constable will levy upon her furniture listed.

JUDGE ADAMS: How much is owed?

MR. STEIN: Well, the total sum, rent plus all the fees involved, is $55 and change. In addition she has food stamps and she has informed me today she has about $3 worth of food stamps, so that (76) her ability to purchase food is—

JUDGE ADAMS: I thought all of these constable's restraints were enjoined by a three-judge court.

JUDGE WOOD: That is what I thought.

MR. STEIN: The confession of judgment has been temporarily restrained. This gives her notice that there will be an action taken against her in Landlord and Tenant Municipal Court and does advise her that the constable is authorized to levy on her personal property for the rent due, listing her personal property.

So it is both this notice of distraint and her food situation, which is close to having no food

at all available in her home. One month's assistance, if that would be it, I think would be clearly deminimus in terms of temporary restraining order standards.

JUDGE KRAFT: Aren't there many other public charitable agencies where she could get temporary relief, rather than ask us as a three-judge court now called on to decide the whole question? I wouldn't want any action taken by me as a member of this Court now to be misread now as indicating prospectively what I might intend to do after I have had an adequate opportunity to review it, study it and come to a final conclusion.

(77) MR. STEIN: We understand.

JUDGE KRAFT: I think certainly charitable groups like the Salvation Army, Red Cross and the like, with the peculiar circumstances that exist here where there is an application pending in court would afford her some temporary relief.

MR. STEIN: Well, it appears that there are no available resources from other community sources. We could put testimony on to that effect. Her financial situation is really extreme. She did apply for assistance six weeks ago.

JUDGE KRAFT: Has she gone to the Panamanian Consul?

MR. STEIN: I don't believe so.

JUDGE KRAFT: She is a Panamanian national.

MR. STEIN: I don't believe so, but the three-judge court statute, 2284, allows a single judge of the three-judge panel to provide temporary relief, or whatever temporary relief is required.

JUDGE KRAFT: I know, but we have now convened and we have heard it as a three-judge court, and I think any action that we take now, since none was granted in her case heretofore, is to easily susceptible (78) of misreading as to what the ultimate conclusions of the Court will be.

MR. STEIN: Well, I think the nature of it being a temporary restraining order is clear, at least would be clear to everyone before this Court today.

JUDGE WOOD: I don't think we have time to listen. I listened to this argument from you before and I am not going to listen to it again. We know all the facts. We know all the facts. If the three of us decide you will get it, you will get it. If we decide you won't, you won't. If you want to refer it to one judge, I will be glad to hear it, but I won't make a decision today.

MR. STEIN: We would be happy to bring it before Your Honor.

JUDGE WOOD: I have already heard your argument on that. The mere fact that this paper was served doesn't change it any. It is a little more shocking, perhaps, but that has been the trouble with your case.

I don't want to repeat myself, but you started this three months ago. You started with Mrs. Leger and then a while later you had Mrs. Jervis in. Then you bring a class action in. Now, are you going to come in next week and ask for a restraining order for somebody (79) else?

MR. STEIN: Well, when we filed this action Mrs. Jervis was not a party plaintiff.

JUDGE WOOD: Of course she wasn't. Why wasn't she? She has been here six months, you say.

MR. STEIN: But at that time she had not applied for assistance and was not denied assistance. Your Honor did deny the temporary restraining order without prejudice, that is quite true.

JUDGE WOOD: That is right, and it is still without prejudice.

MR. STEIN: If you will entertain our application for that temporary restraining order—

JUDGE WOOD: Well, I won't do anything that my colleagues don't agree to, obviously.

JUDGE ADAMS: Why don't we take this matter under advisement You will hear from all of us or from Judge Wood individually on that question.

MR. STEIN: Thank you.

JUDGE ADAMS: Is there anything further that is to be said? If not we will ask that court be adjourned at this time.

EXHIBIT P-1

GENERAL ASSISTANCE AND THE ALIEN IN PENNSYLVANIA

1939 *Amendment of the Public Assistance Law Denying General Assistance to Certain Aliens.* (Act of 1937, June 24, P. L. 2051, Sec. 9(d); Act of 1939, June 26, P. L. 1091, Sec. 9(d). Eligibility for Assistance.)

The Public Assistance Law of 1937 provided for *all needy residents* of Pennsylvania.

As war threatened the United States in 1939, many anti-alien bills were introduced in Congress and in state legislatures. In our own legislature, Representative John E. Van Allsburg of Erie County, introduced in 1939 an omnibus bill making a number of changes in the public assistance laws. Some parts of this bill were defeated and some provisions have since been repealed, but the provision in regard to aliens still remains law. This provision reads as follows:

". . . Other persons who are citizens of the United States and also have a settlement in Pennsylvania, and *all aliens* who have within two years previous to the first day of January, one thousand nine hundred and forty, filed their declaration of intention to become a citizen and who have a legal settlement in Pennsylvania, and need assistance to enable them to maintain for themselves and their dependents a decent and healthful standard of living, and who do not require institutional care because of physical or mental infirmity."

This amendment limited the eligibility of aliens for General Assistance to those who took out "first papers" between January 1, 1938 and December 31, 1939.

In October, 1946, guided by the opinion of the Attorney General, the Department of Public Assistance ruled that aliens who have not become citizens were no longer eligible for General Assistance after January 1, 1947. The reason for this ruling was that "first papers" are valid only for a period of seven years.

In December, 1946, the Attorney General declared, on the basis of a revised opinion, that aliens who had declared their intention to become citizens between January 1, 1938 and December 31, 1939, had acquired "continued eligibility" and are entitled to General Assistance.

During the 1947 session of the State Legislature remedial legislation was introduced in the form of House Bill 1098 (Helm) and House Bill 656 (Bower). H. 1098 passed both Houses and was sent to the Governor on June 4, 1947, but before he had signed it, both Houses recalled it for amendment of the portion which dealt with care of the infirm and chronically ill in public institutions. The amendments were controversial, the time was short, and the bill died with the end of the session. Meanwhile, H. 656, which only repealed the alien provision, had passed the House but died in the Public Health and Welfare Committee of the Senate when it appeared that H. 1098, which carried the same provision, would become law.

Now, in 1949, during the present session of the State Legislature, the same remedial legislation has been introduced for the removal of restrictions against granting General Assistance to aliens.

Data on Aliens in the United States.

The number of aliens in this country has shown a remarkable decrease in recent decades. This decrease is due primarily to restrictive immigration laws, and the recent war, which prompted many aliens already in this country to apply for citizenship.

The Table below gives the number of immigrants admitted to this country during the years 1901 to 1947.

Immigration to the United States
1901-1947

(Source: 1947 Annual Report of the Immigration and Naturalization Service, Department of Justice.)

Period	*No. of Persons Admitted*
1901-1910	8,795,386
1911-1920	5,735,811
1921-1930	4,107,209
1931-1940	528,431
1941-1947	426,965

It is quite apparent from the Table above that with the enactment of the Immigration Act of 1924, which established an annual immigration quota of 153,744, the number of immigrants to this country fell drastically. Also, immigration figures taken from the Immigration and Naturalization Service Annual Report for 1945 reveal that for the period 1931-40, there was a net increase of only 68,693 immigrants, since during the same period 495,738 immigrants left the coun-

try. In the period immediately preceding and following the war (between 1938 and 1947), 2,370,089 aliens were naturalized, against 648,614 newly admitted immigrants.

According to the Alien Registration figures, at the end of 1942 there were 4,280,056 aliens residing in this country. The median age of the alien in 1940 was 48 years as contrasted with the median age of 28 years for native born, and 64.5 percent of the aliens were 45 years or over. Of the total registered aliens, 70 percent came to this country before 1924, and of these, over 900,000 came here prior to 1906. Approximately 700,000 aliens were found to be illiterate.

There is good reason to assume that the number of aliens is constantly declining and that within a short period of years the number will be insignificant. From 1942, (the year for which we have the Alien Registration figures) to 1947, only 346,408 new immigrants were admitted against a 1,236,280 who were naturalized. It is a well known fact to Immigration and Naturalization authorities that recent immigrants "declare their intention to become citizens" almost on the day of their arrival, and take out their citizenship papers as soon as they meet the five years residence requirement. In addition, as indicated above, the aliens represent an aging group of the population and with the passing of years their number is greatly reduced.

Aliens in Pennsylvania Receiving Public Assistance.

The number of aliens in Pennsylvania in 1940, as shown in the Alien Registration, was 365,192 or 3.6 percent of the total state population.

According to a report submitted in 1939 to the State Senate by Howard L. Russell, Public Assistance Secretary, a total of 50,144 aliens were on relief rolls in Pennsylvania. Of these, 43,131 aliens were receiving General Assistance; 3,659, Old Age Assistance; 670, Blind Pensions; and 2,684, Aid-to-Dependent-Children. Included in the total were 13,200 aliens who had applied for citizenship. In 14,200 families with 42,000 citizen dependents, the head of the family was an alien. In 3,437 families in which the head of the family was a citizen, there were 3,523 alien dependents and 11,124 citizen dependents.

In 1947 there were 1,310 aliens receiving General Assistance as a carryover from the period before the citizenship requirement went into effect on January 1, 1940.

Two Sample Studies of the Dependent Alien.

In April, 1947, an effort was made to determine some of the characteristics of the dependent alien.

The Allegheny County Board of Assistance, in cooperation with the Public Charities Association, the Federation of Social Agencies and four private case work agencies conducted two studies and gathered pertinent information in respect to aliens on general assistance and those receiving aid from voluntary agencies in the community.

The study of the Allegheny County Board of Assistance included all of its 391 aliens on relief. The four private agencies examined 48 aliens who were receiving financial aid from them. Both studies showed a striking similarity. The dependent alien is, generally speaking, an old, sick and lonely person.

The Allegheny County Board of Assistance caseload of aliens showed that 79 percent were 55 years of age or over; with the men, as a group, older than the women. A further study of every fourth case in this group, representing a total of 84 aliens, showed that health defects were almost universal among them and illiteracy was common. Seventy-six of the 84 aliens had some handicapping defect. The most frequently occurring disabilities among the men were mental illness or defect, rheumatism, heart disease, visual handicaps, hernia. Only 16 of the 84 aliens, or 19 percent, could be called literate in respect to the English language. Since literacy is a naturalization requirement, it would seem that 81 percent of these aliens were not even eligible to become citizens. Half of this group blamed their failure to complete the citizenship process on lack of educational requirements.

While nearly two-thirds of the men had never worked in any other capacity than as common laborers, and about the same number had not worked for more than five years, the majority of these aliens had a long history of productive work in the past. Only 29 have worked less than 10 years in the United States, while 24 had worked from 10 to 20 years and 16 from 20 to 30 years. Four men had worked in the United States for more than 35 years.

These 84 aliens are not newcomers to our shores; none of them had been in this country for less than 20 years. The great majority (87 percent) had been here more than 30 years and none had been in Pennsylvania for less than 10 years.

The 23 alien men and 25 alien women receiving financial aid from the four private agencies were also an aging group of people. Nearly half of them were over 60 years of age. More than half had been here longer than 35 years and only two had been in the state less than 10 years. Like the aliens receiving public aid, they were for the most part persons who lived alone and had few, if any, relatives in this country. More than half of them were in very poor health. Most of them had been held back from obtaining citizenship status because of lack of education or inability to prove legal entry to this country. Only a few had failed to become citizens through their own neglect.

Both sample studies show that we are dealing with people who had come to this country years ago, when our gates were wide open to all newcomers and our industrialists were seeking to attract workers from other lands with promises of untold prosperity. Many persons who came through these gates were able to adjust their golden dreams to the realities of work and opportunity. Others, plagued by misfortune and handicapped by language difficulties and lack of special skill, were unable to build up security against illness and the decreasing industrial usefulness of advancing age. Uneducated and born to other traditions, some perhaps understood poorly the importance of the privileges and responsibilities of citizenship. Their failure in this respect does not make less real their present inability to help themselves without the aid of the society in which they have long worked and lived.

New Immigrants and Displaced Persons

Immigration to this country is nowadays limited and well regulated. Precautions are taken to avoid the admission of persons who might become public charges. Before a visa is issued, the immigrant has to meet certain health standards, pass a literacy test and prove to the United States consular authorities that he will not become a public charge. If he does become a public charge within five years from the time of his entry, he is liable to deportation. The Immigration and Naturalization Service authorities feel that the number of recent immigrants who may become public charges is very small.

Displaced persons coming to the United States must be vouched for by individual or corporate affidavits guaranteeing that the immigrant admitted will not become a public charge. Organizations bringing displaced persons here on their corporate affidavit assume responsibility for them until they become economically independent. Public funds cannot be used for their support because aliens are subject to deportation if they become public charges during the first five years of their residence in this country.

Summary

(1) The 1939 amendment to the Public Assistance Law, denying General Assistance to aliens, was adopted at a time of war hysteria and anti-alien feelings. It is against the traditions of the state, which always provided assistance to those in need.

(2) The group of aliens in need of General Assistance represents the marginal residue of the mass

immigration to this country before and immediately after the First World War.

(3) The group of dependent aliens is made up for the most part of aging, illiterate, physically handicapped and chronically sick people. Many of them spent their active lives working in mills and mines and contributed to the growth and development of this country.

(4) The number of such needy aliens has been constantly decreasing over the years.

(5) Private agencies, though they are providing financial aid to a small number of aliens ineligible for General Assistance, do not consider aiding this group to be their function or responsibility.

(6) It is very unlikely that any considerable number of present day immigrants or displaced persons will become public charges. Immigration and Naturalization authorities confirm this view.

Alexander J. Stein,
Field Secretary,
American Service Institute

February 17, 1949.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 69-2869

Elsie Mary Jane Leger et al.

v.

William P. Sailer et al.

IX.
ORDER CONSTITUTING A THREE-JUDGE COURT

Pursuant to the provisions of Section 2284, Title 28, United States Code, I designate Honorable Arlin M. Adams, United States Circuit Judge and Honorable C. William Kraft, Jr., United States District Judge, to sit with Honorable Harold K. Wood, United States District Judge, as members of the Court for the hearing and determination of the above entitled case.

William H. Hastie,
Chief Judge, Third Judicial Circuit

Dated: March 11, 1970.
Filed March 12, 1970.
John J. Harding Clerk.
By C. L. J., *Dep. Clerk.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 69-2869
Class Action

Elsie Mary Jane Leger, Beryl Jervis, on behalf of themselves and all others similarly situated

v.

William P. Sailer, individually and as the Executive Director of the Philadelphia County Board of Assistance

Stanley A. Miller, individually and as Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania

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X.

OPINION AND ORDER

July 13, 1970

Concurring Opinion, Circuit Judge Adams and District Judge Kraft; Dissenting Opinion, District Judge Wood.

The issue in this case is whether Pennsylvania's general assistance program runs afoul of the United

States Constitution because it provides welfare aid to United States citizens residing within the Commonwealth, but denies such aid to persons residing in the Commonwealth who are not United States citizens.

The suit comes before us in the form of a class action. The plaintiffs, representing aliens who meet all other eligibility requirements for general assistance, allege that the Pennsylvania statute denies aliens the equal protection of the laws guaranteed by the Fourteenth Amendment, abridges aliens' freedom of interstate travel, and violates the Supremacy Clause of the Federal Constitution since it clashes with the federal power to regulate immigration and naturalization.

Because plaintiffs sought to enjoin a state statute on constitutional grounds which are not insubstantial, a three-judge court was convened pursuant to 28 U.S.C. §§2281, 2284.[1]

There are two major public assistance programs in Pennsylvania. The larger one is known as categorical assistance. Slightly more than one half of the funds for this program, which had its genesis in the Social Security Act of 1935, are provided by the Federal Government. The federally supported arrangement includes programs for aid to the blind, aid to the aged, aid to the permanently and totally disabled and

[1]The jurisdiction of the Federal Court is invoked under 28 U.S.C. §1343(3) and (4), 42 U.S.C. §1983, 28 U.S.C. §2201, §2202, this being an action for declaratory judgment and preliminary and permanent injunctions to redress the deprivation under color of state law of rights, privileges and immunities secured to plaintiffs by the Constitution and laws of the United States.

aid to families with dependent children. In Pennsylvania, aliens are eligible for categorical assistance. The other welfare program in Pennsylvania is general assistance. Section 432(2), Pennsylvania Public Welfare Code, 62 P.S. 432(2).[2] This program provides aid for the needy who do not qualify for grants under the categorical assistance provisions. Because of the citizenship requirement in the general assistance statute, residents of Pennsylvania who are not citizens and who have economic need but do not fit into any of the four federal categories cannot obtain state aid.

The sole reason given for excluding aliens from the general assistance legislation is that such a policy saves money or preserves the Commonwealth's financial resources for citizens. We consider this an inappropriate basis to support such a discrimination under the Equal Protection clause.

The applicable provisions of the Fourteenth Amendment extend protection to "all persons", and therefore include aliens. As early as 1886 the Supreme

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[2] "Section 432. Eligibility.

Except as hereinafter otherwise provided, and subject to the rules, regulations, and standards established by the department, both as to eligibility for assistance and as to its nature and extent, needy persons of the classes defined in clauses (1) and (2) of this section shall be eligible for assistance:

(1) Persons for whose assistance Federal financial participation is available to the Commonwealth * * *.

(2) Other persons who are citizens of the United States, or who, during the period January 1, 1938 to December 31, 1939, filed their declaration of intention to become citizens."

Court held that the Equal Protection and the Due Process Clauses are "universal in their application to all persons within the territorial jurisdiction without regard to any differences of race, color, or of nationality". Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). See also Takahashi v. Fish & Game Com'n, 334 U.S. 410, 420 (1948); Truax v. Raich, 239 U.S. 33 (1915). Cf. Hellenic Lines Ltd. v. Rhoditis, No. 661 (U. S. Sup. Ct. filed June 8, 1970), slip op. at 4. Although the Fourteenth Amendment does not prohibit all classifications in state laws, it requires that such classifications between groups of persons have a legitimate state objective, and that the distinction drawn have a rational basis to effectuate that purpose. Eg. McGowan v. Maryland, 366 U.S. 420 (1961). See Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1082-1087 (1969). The policy of upholding a discriminatory state law provided there is some reasonable basis to do so applies to welfare legislation as well as other state economic or social regulations. Dandridge v. Williams, 397 U.S. 471 (1970). When, however, state legislation in any field —social, economic or political—evidences an intent to discriminate on a basis of race, color, or nationality, the state bears a very heavy burden to justify it.[3] Discrimination on the basis of alienage, even though not a discrimination against a particular nationality, affects a "disadvantaged minority" and is therefore subject to strict judicial scrutiny. Takahashi v. Fish & Game Comm'n, 334 U.S. at 420.

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[3] *See e.g.*, Dandridge v. Williams, 397 U.S. at 485 n. 17; Loving v. Va., 388 U.S. 1, 9 (1967); McLaughlin v. Fla., 379 U.S. 184, 191-92 (1964). Korematsu v. United States, 323 U.S. 214, 216 (1944).

In Takahashi, the Supreme Court specifically compared discrimination based on alienage with discrimination based on color. The Court said that "the Fourteenth Amendment * * * protect[s] 'all persons' against state legislation bearing unequally upon them either because of alienage or color", and that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." 334 U.S. at 420.[4]

In Hobson v. Hansen, Judge Wright explained that "[T]he Supreme Court has been vigilant in erecting a firm justification principle against every legal rule which isolates for differential treatment a disadvantaged minority, whether defined by alienage, * * * nationality * * *; or race * * *." 260 F. Supp. 401, 506-7 (D.D.C. 1967) aff'd sub nom. Smuck v. Hobson, 408 F. 2d 176 (D.C. Cir. 1969).[5]

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[4]In Takahashi the Supreme Court also stated (334 U.S. at 419-20) that aliens are protected by 42 U.S.C. §1981 (formerly Section 41 of the Nationality Act, 8 U.S.C. §41) which provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other".

[5]Takahashi has been cited a number of times to illustrate a classification which is "inherently suspect". *See* Kramer v. Union Free School District, 395 U.S. 621, 628 n. 9 (1969); Harper v. Virginia Board of Elections, 383 U.S. 663, 682 n. 3 (1966); NAACP v. Alabama, 377 U.S. 288, 295 n. 7 (1964).

The reason advanced for the citizenship requirement—saving or preserving public funds—is not compelling when we consider the severity of the deprivation imposed upon the excluded group. Those excluded are deprived of the "means to subsist—food, shelter, and other necessities of life." Shapiro v. Thompson, 394 U.S. at 618, 627 (1969). Though a state is not obligated to grant public assistance, the Supreme Court in Goldberg v. Kelly, 397 U.S. 254 (1970), clearly recognized the significance of such aid when it said: "Public Assistance is * * * not mere charity, but a means to 'promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity.' " 397 U.S. at 265.

In Shapiro v. Thompson, 394 U.S. at 627, the Supreme Court held that the interest of economy was an insufficient foundation to justify the denial of welfare benefits to persons who resided within the state for less than one year. In holding the state residency requirements for welfare eligibility unconstitutional, the Court said that it agreed with the contention that "the statutory prohibition of benefits to residents of less than a year creates a classification which constitutes an invidious discrimination denying them the equal protection of the laws". 394 U.S. at 627. Mr. Justice Brennan, speaking for the Court, made it abundantly clear that a discrimination which denied welfare benefits to a particular group could not be sustained on the ground that such denial saves government funds.[6]

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[6]Financial expense has been held an inadequate reason to justify discrimination in the criminal law. *See* Rinaldi v.

> "We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification." 394 U.S. at 633.

In Goldberg v. Kelly, the Court repeated the proposition that "these governmental interests [of reducing administrative expenses and preventing the disbursement of funds it could not recover] are not overriding in the welfare context." In Goldberg, the Court held that such reasons did not justify the failure to provide a hearing to welfare recipients before aid is terminated, 397 U.S. at 266.

Dandridge v. Williams, one of the most recent Supreme Court cases in the welfare area, does not support the Pennsylvania legislation. Dandridge upheld a state regulation which set a maximum ceiling on the amount of aid for each family regardless of the number of children above a given figure. Although the plaintiffs claimed this created two classes—those with large families and those with small families—

Yeager, 384 U.S. 305 (1966); Griffin v. Illinois, 351 U.S. 12 (1956).

the Supreme Court found that the state had valid reasons, namely, to encourage employment and to avoid discrimination between welfare families and the families of the working poor, which provided a "solid foundation for the regulation". 397 U.S. at 486. Dandridge is distinguishable from the present case on two additional grounds: First, the classification between large and small families is not inherently suspect as is one based on alienage; second, the state did not completely exclude a particular group from all benefits—it merely limited the amount of payment per family.

The justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class is aliens. Aliens like citizens pay taxes and may be called into the armed forces. Unlike the short-term residents in Shapiro, aliens may live within a state for many years, work in the state and contribute to the economic growth of the state. This is illustrated by the stipulated facts in the present case. One of the named plaintiffs here worked in Pennsylvania for four years, until illness forced her to terminate employment.

Pennsylvania's efforts to justify the exclusion here are further weakened when the treatment of aliens in its entire public welfare program is carefully analyzed.

Although the federal statute does not require states to grant assistance to aliens,[7] Pennsylvania permits

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[7]In Richardson v. Graham, a three-judge court held that a 15 year residency requirement in Arizona for aliens requesting public welfare under Arizona's federally supported

aliens to participate in its various categorical assistance programs. 62 P.S. §432(1). The categorical programs are substantially larger than the general assistance program. Indeed, figures from the Commonwealth show that approximately 585,000 persons are on categorical assistance and 85,000 on general assistance.[8] Furthermore, in this case, there was evidence that non-citizen applicants for general assistance are less than 100 per year.[9] Accordingly, it is difficult to lend credence to the rationale that aliens

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programs violated the Equal Protection Clause of the Fourteenth Amendment. No. CIV. 69-158 TUC. (D. Ariz., filed May 27, 1970.)

[8]Department of Public Welfare Report of Public Assistance, Dec. 31, 1969.

[9]Although the Pennsylvania statute does not involve the federal social security program, the defendants say that Congress authorized discrimination against aliens in the federal statute when it stated:

> "The Secretary * * * shall not approve any plan which imposes, as a condition of eligibility for aid * * *
> * * * * * * *
> "(2) Any citizenship requirement which excludes any citizen of the United States. 42 U.S.C. 1202(b)(2) (1964). See also 42 U.S.C. §1352(b)(2) (disabled); 1382(b)(3) (aged, blind or disabled); §302(b)(3) (aged)."

A similar provision in the Federal statute regarding residency was not considered congressional authority to allow one year residency requirements. Shapiro v. Thompson, 394 U.S. at 638-41. The Court in Richardson v. Graham, supra, note 7, also rejected an argument which was similar to that made by the Commonwealth.

In the Civil Rights Act of 1964, Congress prohibited discrimination because of national origin in any program receiving federal assistance. 42 U.S.C. 2000(d).

are denied access to the general assistance program in order to conserve funds.

Pennsylvania attempts to rationalize its discrimination against aliens and contends it is not violating the Fourteenth Amendment because the state has an unqualified right to preserve public money or property for its own citizens. It draws this rule principally from People v. Crane, 214 N.Y. 154, 108 N.E. 427 (1915), aff'd sub nom. Crane v. New York, 239 U.S. 195 (1915).[10] Crane, decided fifty-five years ago, upheld a New York statute which prohibited aliens from working on construction projects paid for with government funds. The validity of this discriminatory legislation today is exceedingly doubtful when the principles enunciated in Takahashi are considered.

In Takahashi, the Supreme Court refused to uphold a California law which denied commercial fishing licenses to aliens although the Court assumed that the provision was passed on "to conserve fish in the California coastal waters or to protect California citizens engaged in commercial fishing from competition by Japanese aliens or for both reasons". 334 U.S. at 418. In that decision, the Court held that the state power to apply its laws exclusively to aliens as a class is confined within narrow limits, and thus reduced the range of legislative purposes which can justify "[s]tate laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States". 334 U.S. at 419.

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[10]Crane was affirmed on the basis of Heim v. McCall, 239 U.S. 175 (1915) which in turn relied on Atkins v. Kansas, 191 U.S. 207 (1903). But see Powell, The Right to Work for the State, 16 Col. L. Rev. 99, 111 (1916).

Judge Cardoza's rationale for the decision in Crane was in large measure grounded on the theory that public employment is a privilege rather than a right. He said: "The state, in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens, rather than that of aliens. Whatever is a privilege, rather than a right, may be made dependent upon citizenship." 108 N.E. at 430. The "privilege-right doctrine" no longer has vitality as a justification for the deprivation of a constitutional right. The Supreme Court has only recently stated, "the constitutional challenge cannot be answered by the argument that public assistance benefits are a 'privilege' and not a 'right'." Shapiro v. Thompson, 394 U.S. at 627, n. 6; Goldberg v. Kelly, 397 U.S. at 262 and cases cited therein. See also Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 82 Harv. L. Rev. 1439 (1968).

The Crane decision, which has not been relied on to uphold anti-alien legislation since it was decided, was rejected as controlling by the California Supreme Court sitting en banc last year.[11] In Purdy & Fitzpatrick v. California, 456 P. 2d 645, 79 Cal. Rptr. 77 (1969), the California Court held that a section of the Labor Code which prohibited employment of aliens on public works was unconstitutional. That Court could find no " 'special public interest' to justi-

[11]Ratti v. Hinsdale Raceway, Inc., 249 A. 2d 859 (N.H. 1969); Garden State Dairies v. Vineland, Inc., 46 N.J. 349, 217 A. 2d 126 (1965); Department of Labor & Industries v. Cruz, 45 N.J. 372, 212 A. 2d 545 (1965), in dicta all indicate doubt as to the validity of Crane.

fy this discriminatory legislation which encroaches upon, the congresisonal scheme for immigration and naturalization, and violates the equal protection clause of the Fourteenth Amendment. 456 P. 2d at 50, 653. It rejected the theory of an absolute proprietary interest in the disbursement of public funds on the basis of the standard and holding of Takahashi.

Pennsylvania also relies on Patsone v. Pennsylvania, 232 U.S. 138 (1914), which allowed a state to preserve game for its own citizens, and on a number of cases upholding restrictions on an alien's right to own property. Terrace v. Thompson, 263 U.S. 197 (1923); Porterfield v. Webb, 263 U.S. 225 (1923); Webb v. O'Brien, 263 U.S. 313 (1923); Frick v. Webb, 263 U.S. 326 (1923). The land cases, questioned by the Supreme Court in Takahashi and Oyama v. California, 332 U.S. 633 (1948),[12] are insufficient authority to uphold discriminatory welfare legislation, just as they were insufficient authority to uphold discriminatory employment legislation in Takahashi and Purdy & Fitzpatrick.

Although there may be an area in which the state may permissibly preserve natural resources for its own citizens by discriminating against aliens, just as it may in such respects discriminate against residents of other states, a discrimination against resident aliens

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[12]In Oyama four justices said the restrictions were unconstitutional. These cases were by two states to invalidate their laws. Fjuii v. State, 38 Cal. 2d 718, 242 P. 2d 617 (1952). Kenji Namba v. McCourt, 185 Ore. 579, 204 P. 2d 569 (1949). See Comment, The Alien and the Constitution, 20 U. Chi. L. Rev. 547, 564-70 (1953). See also State v. Oakland, 287 P. 2d 39, 42 (Montana, 1955).

which, as the parties in this case stipulated, "causes undue hardship by depriving them of the means to secure the necessities of life, including food, clothing and shelter", and "discourages continued residence in Pennsylvania of indigent resident aliens and causes such needy persons to remove to other states which will meet their needs", is substantially different and invalid.

Pennsylvania has cited numerous state statutes which discriminates against aliens.[13] These statutes have not been subjected to judicial scrutiny, and we do not decide the validity or invalidity of any of them at this time. We note, however, that the validity of restrictions on an alien's right to work have been seriously questioned on the basis of Takahashi. See Constitutionality of Restrictions on Aliens' Right to Work, 57 Col. L. Rev. 1012 (1957);[14] Note, 1947-48 Term of the Supreme Court: The Alien's Right to Work, 49 Col. L. Rev. 257 (1949).

We hold that the provision in the general assistance law prohibiting its applicability to residents of Pennsylvania who are not citizens is invalid as violating the Equal Protection Clause of the United States Constitution. In view of this decision we consider it unnecessary to pass upon plaintiffs' other contentions that the Pennsylvania statute violates the Supremacy

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[13]But see Limestone Company, Ltd. v. Fagley, 187 Pa. 193 (1898), where the Pennsylvania Supreme Court invalidated a discriminatory tax on alien employees as violative of the Equal Protection Clause of the Fourteenth Amendment.

[14]For a list of law review material discussing the unconstitutionality of the aliens right to work • • •

Clause of the Constitution and interferes with the aliens' right to interstate travel.

The above constitutes the findings of fact and conclusions of law required by Rule 52(a). Accordingly, the motion for preliminary and permanent injunction will be granted.

Arlin M. Adams,
Circuit Judge
C. William Kraft, Jr.,
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 69-2869
Class Action

Elsie Mary Jane Leger, Beryl Jervis, on behalf of themselves and all others similarly situated

v.

William P. Sailer, individually and as the Executive Director of the Philadelphia County Board of Assistance

Stanley A. Miller, individually and as Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania

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ORDER

On this 13th day of July, 1970, there having been hearings on plaintiff's motions for preliminary and permanent injunctions and declaratory judgment, such motions having been briefed and argued by counsel, and the majority of this Court having decided in an opinion filed July , 1970, that Pennsylvania's general welfare law, 62 P.S. §432(2), violates the Equal Protection Clause of the United

States Constitution, it is ordered and adjudged that the defendants be and are hereby enjoined from enforcing that portion of the Pennsylvania Statute which denies general assistance to persons because of alienage.

Arlin M. Adams,
Circuit Judge
C. William Kraft, Jr.,
District Judge

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DISSENTING OPINION

Wood, District Judge, July 13, 1970.

I must respectfully dissent.

This is a class action brought on behalf of resident aliens to challenge the constitutionality of Section 432(2) of The Pennsylvania Welfare Code, 62 P.S. §432(2) insofar as it denies general public assistance to persons otherwise qualified to receive it solely

on the ground that they are not citizens of the United States.[1] The defendants, who are the state officials charged with administration of the statutory provision which is challenged, concede that the named plaintiffs would qualify for general assistance except for the fact of their alienage, but they maintain that neither federal law nor the constitution precludes the state from denying to aliens that assistance which it dispenses to citizens solely from its own resources.

Plaintiffs first contend that Pennsylvania's citizenship requirement is invalid because it places an undue burden on their right to interstate travel. They place great reliance on Shapiro v. Thompson, 394 U.S. 618 (1969) in which the Supreme Court invalidated Pennsylvania's one year residence requirement for welfare recipients because it "touche[d] on the fundamental right of interstate movement" of citizens and was not justified by any "compelling state interest". However, even assuming *in arguendo* that aliens have the same right in all respects to travel freely between states as do citizens,[2] I do not think

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[1]Since the funds for the general assistance program here challenged are provided entirely by the state and municipalities therein and the program is not supported by federal grants, there is no question presented here of whether the state provisions are in conflict with the Federal Social Security Act or regulations thereunder.

[2]The right to travel between states is not specifically enumerated in the Constitution, but Courts have inferred such a right from several of its provisions. However, when such a right has been mentioned, the Court has referred to it as a right belonging to "citizens". See Shapiro v. Thompson, 394 U.S. 618, 629, 633, ". . . the nature of our Federal Union and our constitutional concepts of personal liberty

that the statutory classification in this case "touches on the fundamental right of interstate movement"[3] in the same respect as the classification proscribed by the Court in Shapiro and that the Court in Shapiro did not intend its holding to encompass state statutes such as the one before us. In Shapiro, it was undisputed and the Court found that the Pennsylvania statute created two classes, the only difference between them being that members of one had been residents of Pennsylvania for a year and members of the other had not, and proceeded to favor the former class on that ground alone. Here, on the other hand, the distinction drawn by the statute in question is between aliens and citizens of the United States. Whether an alien is a long-time resident of Pennsylvania or is newly-arrived from another state is irrelevant; plain-

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unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement"; Edwards v. California, 314 U.S. 160, 181 (1941) ("The conclusion that the right of free movement is a right of National Citizenship stands on firm ground.") Passenger Cases, 7 How. 283, 492 (1849); Kent v. Dulles, 357 U.S. 116, 125 (1958); Ward v. Maryland, 12 Wall 418, 430 (1871). On the other hand, in Truax v. Raich, 239 U.S. 33, 42 (1915) and other cases, the Court has held that aliens lawfully admitted to the country under the authority of acts of Congress have the right to "enter and abide" in the various states. The Court indicated that the alien's right to "enter and abide" stemmed from federal law and not from the Fourteenth Amendment and could therefore be retracted by federal statute. Therefore, it is doubtful that this right to enter and abide of aliens is the same in all respects as the right of citizens to travel between states.

[3]394 U.S. at 638.

tiffs are denied welfare by Pennsylvania not because they have traveled to Pennsylvania from another state, but rather because they are aliens.

To extend Shapiro by holding that the state statutory classification in this case touches on the "fundamental right of interstate movement" and must be abandoned absent a "compelling" state interest would be to put in jeopardy all state laws which treat a certain group of people less generously than that group is treated by another state, and which therefore might disincline persons of lesser means from travelling into that state. Such a holding would virtually require states to provide indigents moving inside its borders with enough money to stay. I am unable to go so far. Since I would not find that Pennsylvania's classification here touches on the right of interstate movement enunciated in Shapiro, I would not reach the question of whether Pennsylvania has demonstrated a "compelling" interest in the classification.

Plaintiffs secondly contend that Pennsylvania's citizenship requirement is invidious and offensive to the equal protection clause. Both parties agree that, as a general proposition, the word "person" in the Fourteenth Amendment includes resident aliens, and that therefore aliens are entitled to the same substantive and procedural benefits of the Amendment as citizens. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). Further, the plaintiffs concede that in a number of cases in the wake of Yick Wo the Court carved out a number of exceptions to the foregoing general proposition, one among them being that the "moneys of

the state belong to the people of the state" and "do not belong to aliens" and therefore the state may favor its citizens to aliens in the distribution of the common property or resources of the people of the state. McCready v. Virginia, 94 U.S. 391 (1877). As Justice Cardozo, at the time a member of the New York Court of Appeals, stated in a case involving state preference of citizens over aliens in public works contracts:

> "Every citizen has a like interest in the application of the public wealth to the common good and the right to demand that there be nothing of partiality, nothing of merely selfish favoritism in the administration of the trust. But an alien has no such interest; and hence results a difference in the measure of his right. To disqualify citizens from employment on the public works is not only discrimination but arbitrary discrimination. To disqualify aliens is discrimination indeed, but not arbitrary discrimination, for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. Ungenerous and unwise, such discrimination may be. It is not for that reason unlawful." People v. Crane, 108 N.E. 2d 425 (1915).

The decision of the New York Court was thereafter unanimously affirmed by the Supreme Court in an opinion which summarily dismissed as "without foundation" the plaintiffs' claim that the state's preference of citizens over aliens in public works violated the equal protection clause. Crane v. New York, 239

U.S. 195, 199 (1915). See also Heim v. McCall, 239 U.S. 175 (1915).[4]

The plaintiffs contend, however, that these early precedents have in effect been overruled *sub silentio* by other decisions. I disagree because I think to the contrary that subsequent decisions have either affirmed or left untouched the Crane doctrine. In Truax v. Raich, 239 U.S. 33 (1915), cited by the plaintiffs, the Court held that a state statute providing for discrimination against aliens in matters relating to "ordinary private enterprise" violates the right of aliens to "enter and abide" in that state unless there is a "special state interest" involved and invalidated an Arizona law requiring all private commercial business to have work forces composed of at least 80 percent United States citizens. The Court found in that case that there was no "special state interest" in such an all encompassing regulation of "all ordinary private enterprise".[5] In its decision, which was handed down the same year as Crane, the Court said nothing to diminish the effect of the McCready-Crane doctrine and in fact specifically cited McCready and

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[4]In which a unanimous court upheld against attack on Fourteenth Amendment grounds a New York statute which provided that "In the construction of public works by the state or a municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works preference shall be given citizens of the State of New York".

[5]The Court stated at 239 U.S. 43 that "no special public interest with respect to any particular business is shown that could possibly support the enactment, for as we have said it relates to every sort".

some of its progeny with approval. See 239 U.S. at p. 40.

More recently, in Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948), also relied upon by the plaintiff, the Court cited with approval the standards enunciated in Truax and invalidated a California law forbidding Japanese aliens from commercial fishing off the California coast on the ground that the state had not demonstrated a "special public interest" in regulating Takahashi's commercial fishing. It is true that in Takahashi the Court recognized the technical possibility that California might in some sense "own" those fish which ventured inside the three-mile ocean limit,[6] but the Court treated the California law as a regulation of aliens in private enterprise under the Truax test and left untouched the McCready-Crane doctrine.

I have not found, nor do I find in Shapiro v. Thompson,[7] supra, or Goldberg v. Kelly, 397 U.S. 254 (1970)[8] cited by the plaintiffs (neither of which

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[6] The law in question barred all aliens residing in California from commercial fishing off the California coast, whether within or without the three-mile limit.

[7] Shapiro was decided on the ground of interference with the right of interstate movement and has already been discussed on that ground. We note in passing that contrary to the plaintiffs' assertions, the "compelling state interest" required to justify state legislation relating to interstate movement in Shapiro does not apply to cases involving welfare legislation. Dandridge v. Williams, 397 U.S. 471 (1970).

[8] In Goldberg, the Court held that whether welfare was considered as a privilege or a right, it could not be terminated without a fair hearing. However, subsequently in Dandridge v. Williams, supra, the Court intimated that the hold-

relates to aliens) any indication that the Court has overruled the doctrine of Crane and Truax[9] that while the state, absent a special state interest, is not permitted to intrude upon an alien's right to "enter and abide" by statutes which discriminate against them as opposed to citizens in the conduct of ordinary private enterprise, the state as proprietor of the resources of the citizens of the state may favor its own citizens in

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ing in Goldberg was not intended to affect state determination of welfare eligibility:

> "The constitution may impose certain procedural safeguards upon systems of welfare administration . . . (citing Goldberg) *But the constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.*" (Emphasis mine.) 397 U.S. 471, 487 (1970).

[9] I do not see anything in Takahashi, supra, at p. 420 to the effect that because state legislation relating to aliens affects a "disadvantaged minority" it is therefore subject to "strict judicial scrutiny" apart from the ordinary "rational basis" test ordinarily applied to state welfare legislation. Cf. Dandridge v. Williams, 397 U.S. 471 (1970). At that point in Takahashi, supra, the Court in effect points out that in view of the general rule enunciated in Yick Wo v. Hopkins, supra, the superseding effect of federal laws regulating aliens, Hines v. Davidowitz, 312 U.S. 52 (1941), and 8 U.S.C. §41, the power of the states to pass laws relating to aliens is limited. Both parties here concede this. Moreover, the Court in Takahashi, supra, was making the point, with which all are in agreement, that pursuant to its powers to regulate aliens, Congress can make certain distinctions which the states cannot. Accordingly, the compelling state interest required to justify state legislation inhibiting an alien's right to travel, Cf. Shapiro v. Thompson, supra, or to legislation affecting a "disadvantaged minority" would be inapplicable here.

the disbursement of those resources.[10] Being mindful of the recent admonition of the Supreme Court that the *"Fourteenth Amendment gives the federal courts no power to impose on the states their views of wise economic or social policy"*[11] I would not overturn what I consider to be a settled precedent.

Plaintiffs' final contention is that Pennsylvania's general assistance citizenship requirement conflicts with federal laws relating to the admission and naturalization of aliens and is therefore preempted pursuant to the supremacy clause. We are specifically directed to several provisions of federal law relating to the admission of indigents to this country: Title 18 U.S.C. §§7, 8, and 15 provide *inter alia* that the following classes of aliens shall be excluded from admission: "paupers", "aliens . . . who are likely at any time to become public charges", and "aliens . . . who are certified . . . as having a physical defect, disease, or disability . . . of such a nature that it may affect the ability of the alien to earn a living . . ." Section 1251 allows the Attorney General under certain circumstances to deport an alien who has become a public charge. Section 1183 provides that an alien excludable because he is likely to become a public charge may be admitted at the discretion of the Attorney General after posting a bond.

I take the standard for determining whether a state law relating to aliens is preempted by federal

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[10]This distinction was cited with approval by the Supreme Court as recently as 1960 in Cafeteria Workers v. McElroy, 367 U.S. 886 (1961).

[11](Emphasis mine) Dandridge v. Williams, supra, at p. 486 (1970).

law from Hines v. Davidowitz, 312 U.S. 52 (1941). In that case, where the Court invalidated a Pennsylvania alien registration law, because it overlapped federal law, Justice Black stated *inter alia* that:

> ". . . where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail, or complement, the federal law, or enforce additional or auxiliary regulations." 312 U.S. 66-7.

It was further stated that any concurrent power in such a field must be "restricted to the narrowest of limits", 312 U.S. at 68, but that "in the final analysis, there can be no one crystal clear distinctly marked formula" for determining whether the state law is inconsistent with federal law.

> "Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". 312 U.S. at 67.

In the light of these standards I cannot conclude that Pennsylvania's citizenship requirement is preempted by federal law. Hines and other cases relied upon by the plaintiffs were concerned with requirements under state law which would hinder, obstruct, or harass aliens in such a way as to interfere with the federal scheme of regulation. Pennsylvania's citi-

zenship requirement does not regulate the conduct of aliens, but rather excludes them from an affirmative benefit which the state may or may not decide to dispense to its own citizens. If the state had no welfare program at all, federal laws relating to aliens would not be obstructed; it is difficult to see how federal laws are obstructed any more because the state decides to give welfare payments to citizens.

By the same token, I am unable to conclude that the specific statutory provisions cited previously and relied on by the plaintiffs evidence any Congressional intent to require the states to include (or, for that matter, not to include) aliens as beneficiaries of their welfare programs. To the contrary, the federal laws cited previously leave the impression that Congress wanted to relieve the states (and the federal government) of the burden of aliens who were, or might become, public charges. I cannot infer from such an intent to relieve the states of such a burden, a corresponding intent to require the states to pay welfare to aliens.

Accordingly, I respectfully dissent.

Harold K. Wood,
J.

Supreme Court of the United States

No. 727 -----, *October Term, 19* 70

William P. Sailer, et al.,

Appellants,

v.

Elsie Mary Jane Leger and Beryl Jervis

APPEAL from the United States District Court for the Eastern District of Pennsylvania.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

December 14, 1970